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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. ~~412.~~ /8

ELIAB W. METCALF, PLAINTIFF IN ERROR,

vs.

THE CITY OF WATERTOWN.

14 W. 586

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

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FILED SEPTEMBER 7, 1889.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Eliab W. Metcalf, plaintiff, and The City of Watertown, defendant, a manifest error hath happened, to the great damage of the said Eliab W. Metcalf, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
b of the said Supreme Court, the second day of August, in the year of our Lord one thousand eight hundred and eighty-nine.

F. M. STEWART,
Clerk of the Circuit Court of the United States for the Western District of Wisconsin.

Allowed by—
R. BUNN,
District Judge, Sitting as Circuit Judge of said District.

UNITED STATES OF AMERICA, *Western District of Wisconsin,* } *ss:*

The return of the judges of the circuit court of the United States in and for the western district of Wisconsin to the foregoing writ of error is found in the transcript, citation, and assignment of errors hereto annexed.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at the city of Madison, in said district, this 2d day of August, in the year of our Lord one thousand eight hundred and eighty-nine and of the Independence of said United States the 113th.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

F. M. STEWART,
Clerk of said Court.

[Endorsed:] In the Supreme Court of the United States. Eliab W. Metcalf, pl'ff in error, *vs.* The City of Watertown, def't in error. Writ of error. Filed Aug. 2, 1889. F. M. Stewart, c'k.

1 In the Circuit Court of the United States in and for the Western District of Wisconsin.

ELIAB W. METCALF, Plaintiff,
vs.
THE CITY OF WATERTOWN, Defendant.

Transcript of Record.

Be it remembered that heretofore, to wit, on the 29th day of June, 1883, came the above-named plaintiff, by A. R. R. Butler, his attorney, and filed his præcipe for a summons as follows:

Præcipe.

United States Circuit Court, Western District of Wisconsin.

ELIAB W. METCALF, Plaintiff,
vs.
THE CITY OF WATERTOWN.
} Action for Relief.

F. M. Stewart, clerk.

SIR: Issue summons in above-entitled action according to law; complaint not served.

Yours, &c., A. R. R. BUTLER,
Plaintiff's Attorney.

June 29th, 1883.

And at the same time said plaintiff filed bond for costs as follows:

Bond for Costs.

Know all men by these presents that I, E. E. Chapin, of the city and county of Milwaukee, Wisconsin, am held and firmly bound unto the City of Watertown in the sum of two hundred dollars, to be paid to the said City of Watertown, its successors or assigns; to which payment, well and truly to be made and done, I do bind myself, my heirs, executors, and administrators, jointly and sev-
2 erally, firmly by these presents.

Sealed with our seals the 25th day of June, A. D. 1883.

Whereas an action in the circuit court of the United States, western district of Wis., is about to be commenced at the suit of Eliab W. Metcalf, plaintiff, and The City of Watertown, defendant:

Now, therefore, the condition of this obligation is such that if the plaintiff will pay all costs that may be awarded against him, not exceeding the aforesaid sum, then this obligation to be void; else valid.

E. E. CHAPIN. [SEAL.]

Witness:
J. E. FRIEND.
ARTHUR SPANGENBERG.

EASTERN DISTRICT OF WISCONSIN, *ss:*

E. E. Chapin, being duly sworn, says that he is worth the sum of five hundred dollars, exclusive of property exempt from execution and his debts.

E. E. CHAPIN.

Subscribed and sworn to before me the 25th day of June, A. D. 1883.

J. E. FRIEND,
Notary Public.

[NOTARIAL SEAL.]

Whereupon a summons issued as follows:

Summons.

Circuit Court of the United States for the Western District of Wisconsin.

ELIAB W. METCALF, Plaintiff,
vs.
THE CITY OF WATERTOWN, Defendant.

The President of the United States of America to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and
3 defend the above-entitled action in the court aforesaid; and, in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint which will be filed in the office of the clerk of this court, at Madison, Wisconsin; and you are also required to file your answer in said action in the office of the clerk of this court, at the city of Madison, within the time above specified.

The marshal of said district is hereby commanded to serve this summons and make due return thereto.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Madison, in the said western district of Wisconsin, this 29th day of June, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and seventh.

F. M. STEWART, *Clerk.*

A. R. R. BUTLER,
Plaintiff's Attorney.

P. O. address, Milwaukee, Wis.

The service of said summons appears by the endorsement of the marshal thereon, as follows:

Marshal's Return.

Served on the within-named The City of Watertown by delivering a copy of the within summons to Henry Bieber, city clerk, and

also a copy thereof to Charles H. Gardner, city attorney, and also a copy thereof to Fred. Kusel, the last elected chairman of the board of street commissioners of said city, this 2nd day of July, 1883, the office of mayor of said city being vacant, and there being no president of the common council or presiding officer thereof in office.

F. W. OAKLEY, *Marshal*,
By W. S. MAIN, *Deputy*.

Fees:

Service	$6 00
Copies	60
Travel	2 40
	$9 00

4 Afterwards, to wit, on the 24th day of July, 1883, came the said defendant, by George W. Bird and Daniel Hall, its attorneys, and filed notice of appearance as follows:

Notice of Appearance.

Circuit Court of the United States.

ELIAB W. METCALF, Plaintiff,
vs.
THE CITY OF WATERTOWN, Defendant.

Please take notice that we are retained by and appear for the defendant, The City of Watertown, in the above-entitled action, and we demand that a copy of the plaintiff's complaint therein be served upon us at the office of Hall & Skinner, in the 4th ward of the city of Watertown, Jefferson Co., Wisconsin.

Yours, &c.,
GEO. W. BIRD AND
DANIEL HALL,
Attorneys for Defendant.

P. O. address, Watertown, Wis.
Dated Watertown, Wis., July 14th, 1883.

To A. A. R. Butler, Esq., attorney for plaintiff.

Afterwards, to wit, on the 9th day of August, 1883, came said plaintiff, by A. R. R. Butler, his said attorney, and filed his complaint, which is not here transcribed, an amended complaint having afterwards been substituted therefor by order of the court, as hereinafter appears.

Afterwards, to wit, on the 20th day of August, 1883, came said defendant, by its said attorneys, Geo. W. Bird and Daniel Hall, and filed its answer to said complaint, which answer is not here transcribed, a new answer having been filed in the action after the filing of the amended complaint aforesaid, as hereinafter appears.

5 Afterwards, to wit, on the 11th day of December, 1883, came said plaintiff, by his said attorney, and filed his replication herein; which replication is not here transcribed, the same having

afterwards been stricken from the files by order of the court, as hereinafter appears.

And afterwards, to wit, on the 2nd day of December, 1884, came said parties and filed their written stipulation waiving trial by jury.

And on the same day, to wit, said 2nd day of December, 1884, an order was made and entered in said cause as follows:

Order Striking Out Replication.

"The defendant having called up the motion to strike from the files the plaintiff's replication to defendant's answer, it is ordered, upon stipulation of the parties, now here made in open court, that said replication be, and the same hereby is, stricken from the files of this court, and that the plaintiff have leave to withdraw the same."

And the hearing of the issue is concluded and the cause taken under advisement.

And afterwards, to wit, on the 17th day of January, 1885, the court announced its decision as follows:

Decision of Court.

On consideration, the court finds for the defendant on the plea of the statute of limitations. Let the proper findings be prepared accordingly and judgment go thereon for the defendant.

And comes the plaintiff and moves the court for a new trial; and the said motion coming on to be heard on the 21st day of April, 1885, before Hon. Walter Q. Gresham, circuit judge, and Hon. Romanzo Bunn, district judge, sitting as circuit judge, the following order was, on said 21st day of April, 1885, made and entered in said cause:

6 The motion for a new trial coming on to be heard and having been argued by counsel, and the court, being now sufficiently advised, doth order that the motion for a new trial be, and the same is hereby, overruled.

Afterwards, to wit, on the said 21st day of April, 1885, special findings of fact and conclusions of law were filed in said cause by the court.

And afterwards, to wit, on the 22nd day of April, 1885, judgment was duly entered upon said findings in favor of the defendant.

The findings of fact and conclusions of law aforesaid and the judgment aforesaid are not here transcribed, said judgment having been afterwards reversed by the Supreme Court of the United States and said cause having been sent back for a new trial, as hereafter appears.

Afterwards, to wit, on the 28th day of May, 1885, the following order was entered in said cause:

On reading and filing the consent in writing signed by Eliab W. Metcalf, plaintiff, and consent in writing signed by A. R. R. Butler, plaintiff's attorney, of record, ordered that Charles E. Monroe, of Milwaukee, be substituted in his place and stead.

Afterwards, to wit, on the 27th day of August, 1885, the said plaintiff, having sued out a writ of error to reverse the judgment aforesaid, came and filed the same in the office of the clerk of said court, together with security on writ of error, of which writ of error due return was made, and a true copy of the record and of all the proceedings in said cause under the hand of the clerk of said circuit court and under its seal transmitted to the clerk of said supreme court on the 9th day of October, 1885.

And thereafter, to wit, on the 26th day of April, 1889, came the said plaintiff and filed herein the mandate of said supreme
7 court, as follows:

Mandate.

UNITED STATES OF AMERICA, *ss:*

[SEAL OF COURT.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the western district of Wisconsin, Greeting:

Whereas lately, in the circuit court of the United States for the western district of Wisconsin, before you or some of you, in a cause between Eliab W. Metcalf, plaintiff, and The City of Watertown, defendant, wherein the judgment of the said circuit court entered in said cause on the 22d day of April, A. D. 1885, is in the following words, viz:

"The præcipe herein having been filed, and the summons herein having been issued and placed in the hands of the marshal for service on the 29th day of June, 1883, and copies of said summons having been delivered, one to Henry Bieber, city clerk, and one to Charles H. Gardner, city attorney, and one to Fred. Kusel, the last elected chairman of the board of street commissioners of said city, on the 2d day of July, 1883, and the defendant having duly appeared herein on the 23rd day of July, 1883, and demanded a copy of the complaint herein, and the said complaint having been duly served on the defendant's attorneys on the 7th day of August, 1883, and the defendant's answer to said complaint having been duly served on the plaintiff's attorney on the 18th of August, 1883, and plaintiff's replication to said answer having been served on defendant's attorneys on the 8th day of December, 1883, and the said replication having been duly returned to the plaintiff's attorney by the defendant's attorneys on the 8th day of December, 1883, and the said replication having been duly stricken from the files of this court
8 upon motion of the defendant and stipulation of parties made in open court on the 2nd day of December, 1884, and a jury having been duly waived by a written stipulation of the parties duly made and filed herein, and this action having been brought to trial upon the issues joined by said complaint and answer at the December term of this court for the year 1884, to wit, on the 2nd day of December, 1884, before the court without a jury, Justice Bunn, district judge, presiding, and the case having been taken under ad-

visement, and the court having announced its decision on the 17th day of January, 1885, finding in favor of the defendant on its plea of the bar of the statute of limitations, and the clerk of this court having entered such decisions, on page 11, Law Docket B, incorrectly, as follows, 'On consideration it is ordered that plaintiff's demurrer to defendant's answer be overruled, and judgment goes for defendant,' and a stay of proceedings and motion for a new trial and reargument before the full bench having been entered herein on the 26th day of January, 1885, and notice of motion for a new trial and leave to amend the said complaint having been served by plaintiff's attorney on defendant's attorneys on the 10th day of April, 1885, and the said several motions having been duly heard and argued before this court at the December term thereof for the year 1884, to wit, on the 21st day of April, A. D. 1885, Justices Gresham and Bunn presiding, and the same having been then duly denied, and the said entry of the clerk on page 11, Law Docket B, having been, by order of the court, duly corrected on said 21st day of April, 1885, so as to read, 'On consideration the court finds for defendant on its plea of the statute of limitations. Let the proper findings be prepared accordingly and judgment go thereon for the de-
9 fendant,' and the court having duly made and filed its written findings of fact and conclusions of law on the 21st day of April, 1885, wherein it is found, among other things, as conclusions of law, that the cause of action set out in the complaint herein did not accrue within ten years before the commencement of this action, and that this action is and at the time of its commencement was barred by the statute of limitations, and that the defendant is entitled to judgment herein; that the plaintiff take nothing by his action, and that the defendant go thereof without day, and that it have and recover of the plaintiff the costs of this action, to be taxed:

Now, therefore, on motion of George W. Bird and Daniel Hall, attorneys for the said defendant, it is hereby ordered and adjudged that the plaintiff take nothing by his action, and that the defendant go thereof without day, and that the defendant, The City of Watertown, have and recover of the plaintiff, Eliab W. Metcalf, the sum of eighteen dollars and fifty cents, the costs and disbursements of this action.

Dated April 22d, A. D. 1885."

as by inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty-eight, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel;

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause

be, and the same is hereby, reversed, costs to be paid by
10 plaintiff in error.

And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court, with directions for such further proceedings as may be consistent with law.

DECEMBER 10, 1888.

You, therefore, are hereby commanded that such further proceedings be had in said cause in conformity with the opinion and judgment of this court as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the seventh day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

And afterwards, to wit, on the 7th day of May, 1889, the following order was made and filed in said cause:

Order Allowing Amended Complaint.

United States Circuit Court, Western District of Wisconsin.

ELIAB W. METCALF, Plaintiff,
vs.
THE CITY OF WATERTOWN, Defendant.

The motion of the plaintiff above named for leave to file and serve in the above-entitled action an amended complaint in lieu of and as a substitute for the original complaint heretofore filed and served in said action having come on to be heard on the 7th day of May, 1889, upon the mandate of the Supreme Court of the United States,
11 and upon all the records and files of said circuit court in said cause, and upon said plaintiff's affidavit of verification annexed to his proposed amended complaint—

C. E. Monroe, Esq., appearing in support of said motion, and Messrs. Daniel Hall and Geo. W. Bird appearing in opposition thereto—

And counsel having been heard and the court being now fully advised in the premises—

It is ordered that said plaintiff be, and he is hereby, given leave to file and serve said amended complaint in the above-entitled action in lieu of and as a substitute for his original complaint heretofore filed and served therein.

It is also ordered that the defendant be, and it is hereby, given 30 days in which to plead, answer, or demur to said amended complaint.

Dated this 7th day of May, A. D. 1889.

By the court:

R. BUNN,
District Judge.

And afterwards, to wit, on said 7th day of May, 1889, came said plaintiff and filed his amended complaint as follows:

Amended Complaint.

In the Circuit Court of the United States for the Western District of Wisconsin.

ELIAB W. METCALF, Plaintiff,
vs.
THE CITY OF WATERTOWN, Defendant.

And now comes Eliab W. Metcalf, of Elyria, Ohio, the plaintiff above named, by C. E. Monroe, his attorney, and for his amended complaint in the above-entitled action shows unto this court as follows:

That this plaintiff was on the 29th day of June, 1883, be-
12 ing the time when said action was commenced, ever since has been, and now is a citizen of the State of Ohio.

That The City of Watertown, the defendant above named, was on the said 29th day of June, 1883, being the time of the commencement of this action as aforesaid, ever since has been, and now is a municipal corporation created, organized, and existing under and by virtue of the laws of the State of Wisconsin and a citizen of said State of Wisconsin and situated in said district.

That Pitkin C. Wright, hereinafter mentioned, was on the said 29th day of June, 1883, being the time of the commencement of this action as aforesaid, ever since has been, and now is a citizen of the State of Tennessee and a resident of the city of Nashville, in said State.

That Fanny Beach Ely, hereinafter mentioned, was on the said 29th day of June, 1883, being the time of the commencement of this action as aforesaid, a citizen of the State of Illinois and continued to be a citizen of said State of Illinois until on or about the first day of July, 1884, when she became a citizen of the State of Ohio, of which last-mentioned State she has ever since continued to be and now is a citizen and a resident of the village of Oberlin, in said State.

That Samuel S. Beach, hereinafter mentioned, departed this life on the 22nd day of July, 1874, and was at the time of his decease a resident of Clinton, Iowa, and a citizen of the State of Iowa, and that no executor or administrator has ever been appointed upon his estate.

That at a stated term of the circuit court of the United
13 States in and for the then district of Wisconsin begun and held at the city of Milwaukee on the second Monday (being the ninth day) of April A. D. 1866, the above-named Pitkin C. Wright, then plaintiff, recovered a judgment, which was duly given by said last-mentioned court, against the defendant above named, upon the 8th day of May, A. D. 1866, for the sum of ten thousand one hundred and fifty dollars and forty-six cents ($10,150.46) damages, together with the sum of fifty-seven dollars and forty cents

($57.40), costs and disbursements, amounting in all to the sum of ten thousand two hundred and seven dollars and eighty-six cents ($10,207.86), in an action at law wherein the said Pitkin C. Wright was plaintiff and the above-named defendant was defendant.

That afterwards, to wit, on or about the 24th day of April, A. D. 1872, the said Pitkin C. Wright, for a valuable consideration, duly assigned twenty-five sixty-firsts ($\frac{25}{61}$) of said judgment to the above-named Fanny Beach Ely; and

That afterwards, to wit, on or about the 24th day of August, A. D. 1872, the said Pitkin C. Wright, for a valuable consideration, duly assigned fifteen sixty-firsts ($\frac{15}{61}$) of said judgment to the above-named Samuel S. Beach; and

That afterwards, to wit, on or about the 8th day of August, A. D. 1873, the said Pitkin C. Wright, for a valuable consideration, duly assigned all the remaining portion of said judgment to said Fanny Beach Ely and said Samuel S. Beach.

That afterwards, to wit, on or about the 30th day of August, A. D. 1873, the said Fanny Beach Ely and Samuel S. Beach, then being the owners of the whole of said judgment, for a valuable consideration, assigned the whole of said judgment to said Eliab W. Metcalf, who thereby became and ever since has been the owner of
14 said judgment and of the whole thereof.

That all of said assignments were duly filed and recorded in the office of the clerk of the said last-mentioned court, in the said city of Milwaukee, on or about the 8th day of September, A. D. 1873.

That the said Eliab W. Metcalf was at the time of the commencement of this action and is now the owner of said judgment.

That the said judgment has not been appealed from, reversed, or satisfied, and no part thereof has been paid, and that there is now due thereon the sum of $10,207.86, together with interest from said 8th day of May, A. D. 1866.

Wherefore this plaintiff demands judgment against said defendant for said sum of $10,207.86, with interest thereon from said 8th day of May, A. D. 1866, and for his costs of this action, to be taxed.

ELIAB W. METCALF,
By C. E. MONROE,
His Attorney.

STATE OF OHIO, }
County of Lorain, } *ss:*

Eliab W. Metcalf, being first duly sworn, deposes and says that he is the plaintiff named in the foregoing complaint; that he has read said complaint and knows the contents thereof, and that the same are true of his own knowledge except as to matters therein stated on information and belief, and that as to those matters he believes them to be true.

E. W. METCALF.

Sowrn to before me and subscribed in my presence this 12th day of April, A. D. 1889.

LESTER McLEAN,
Notary Public, Lorain Co., Ohio.

15 And afterwards, to wit, on the 11th day of June, 1889, came said plaintiff and filed amendments to his amended complaint as follows:

Amendments of Amended Complaint.

In the Circuit Court of the United States for the Western District of Wisconsin.

ELIAB W. METCALF, Plaintiff,
vs.
THE CITY OF WATERTOWN, Defendant.

And now comes Eliab W. Metcalf, the plaintiff above named, and says that the allegations concerning the residence and citizenship of Samuel S. Beach contained in the third folio of the amended complaint heretofore filed in this action are erroneous, as this plaintiff has since the filing thereof discovered, and for the sake of correcting such error, as well as for the sake of adding certain other allegations of facts which were inadvertently omitted from said amended complaint, this plaintiff amends said amended complaint as follows:

First. By striking out of said amended complaint the sentence contained in the third folio thereof relating to said Samuel S. Beach and inserting in lieu thereof the following allegations, to wit: "That Samuel S. Beach, hereinafter mentioned, departed this life intestate on the 22nd day of July, 1874, and was at the time of his decease a resident of the city of Chicago, in the State of Illinois, and a citizen of said State of Illinois; that he left surviving him his widow, Bena C. Beach, and his only child, Samuel C. Beach, both of whom were on said 22nd day of July, 1874, ever since have been, and now are residents of said city of Chicago and citizens of said State of Illinois, and that no executor or administrator has ever been
16 appointed upon the estate of said Samuel S. Beach."

Second. By adding to the sentence relating to an assignment from Pitkin C. Wright to Fanny Beach Ely and Samuel S. Beach, contained in the sixth folio of said amended complaint, the following words, to wit, "in equal proportions, giving them equal interests in said remaining portion of said judgment," so that said sentence shall read as follows, to wit: "That afterwards, to wit, on or about the 8th day of August, A. D. 1873, the said Pitkin C. Wright, for a valuable consideration, duly assigned all the remaining portion of said judgment to said Fanny Beach Ely and said Samuel S. Beach in equal proportions, giving them equal interests in said remaining portion of said judgment."

C. E. MONROE,
Attorney for the Plaintiff Aforesaid.

STATE OF OHIO, } ss:
County of Lorain, }

Eliab W. Metcalf, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the foregoing amendments of the amended complaint in said action and knows the contents thereof, and that the same are true, as he is informed and verily believes.

ELIAB W. METCALF.

Sworn to before me and subscribed in my presence by the said Eliab W. Metcalf this 27th day of May, A. D. 1889.

A. R. WEBBER,
[NOTARIAL SEAL.] *Notary Public, Lorain Co., Ohio.*

And endorsed thereon was defendant's admission of service as follows:

17 Service of within by copy admitted this 30th day of May, 1889.

GEO. W. BIRD AND
D. HALL,
Att'ys for Def't.

And on the 13th day of June, 1889, came said defendant and filed its answer to said amended complaint, as follows:

Answer to Amended Complaint.

United States Circuit Court, Western District of Wisconsin.

ELIAB W. METCALF, Plaintiff,
vs.
THE CITY OF WATERTOWN, Defendant.

The answer of the above-named defendant, The City of Watertown, to the plaintiff's amended complaint and to the amendments of amended complaint, verified May 27th, 1889, in the above-entitled action by George W. Bird and Daniel Hall, its attorneys, respectfully shows to the court—

First. That it denies that it has any knowledge or information sufficient to form a belief as to whether Samuel S. Beach, named in said amended complaint, departed this life, or as to whether any executor or administrator has ever been appointed upon his estate, or as to whether he left surviving him a widow and one child, or as to whether the said Pitkin C. Wright, named in said amended complaint, on or about the 24th day of April, 1872, or at any other time, for a valuable consideration or otherwise, assigned twenty-five sixty-firsts of the judgment mentioned in said amended complaint to Fanny Beach Ely for a valuable consideration or otherwise; or as to whether, on or about the 24th day of August, 1872, or at any other time, said Pitkin C. Wright, for a valuable consideration or otherwise, as-

signed fifteen sixty-firsts of said judgment to said Samuel
18 S. Beach; or as to whether, on or about the 8th day of August, 1873, or at any other time, the said Pitkin C. Wright, for a valuable consideration or otherwise, assigned the remaining portion of said judgment to said Fanny Beach Ely and said Samuel S. Beach, in equal proportions or otherwise, giving them equal interests in such remaining portion of said judgment, or any interest therein whatever; or as to whether thereafter, on or about the 30th day of August, 1873, or at any other time, the said Fanny Beach Ely and Samuel S. Beach, for a valuable consideration or otherwise, assigned the whole or any part of said judgment to the plaintiff; or as to whether the plaintiff was, at the time of the commencement of this action, or ever has been, the owner of said judgment; or as to whether the said alleged assignments were, or any or either of them was, on or about the 8th day of September, 1873, or at any other time, filed and recorded in the office of the clerk of the court wherein said judgment was recovered; or as to whether the said Fanny Beach Ely and Samuel S. Beach ever were, or either of them ever was, the owners or owner of the said judgment or any part thereof.

And said defendant denies that any record has ever been made of said alleged assignments, or any or either of them, in said last-mentioned court or elsewhere.

Second. For a second and further defense to said action and to the whole cause of action stated in said complaint the said defendant further alleges that the said cause of action stated in said complaint did not accrue within ten years next before the commencement of this action, and did not accrue within the ten years limited by law for the commencement thereof after the same accrued, and that
19 on and at the end of the 8th day of May, 1876, the said action became and was and ever since has been barred by the statute of limitations of the State of Wisconsin.

Wherefore the defendant demands the judgment of the court dismissing said complaint and for its costs herein.

GEO. W. BIRD,
DANIEL HALL,
Defendant's Attorneys.

WESTERN DISTRICT OF WISCONSIN, *ss:*

Henry Bieber, being first duly sworn, doth depose and say that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on his information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the defendant is that the defendant is a corporation and that this deponent is an officer thereof, to wit, that he is the city clerk of said defendant city, and that his knowledge is derived from the laws of the State of Wisconsin and documents in his possession as such city clerk, and that the grounds of his belief are such laws and documents and

information communicated to him by the officers and agents of the said corporation.

HENRY BIEBER.

Subscribed and sworn to before me this 5th day of June, 1889.

C. B. SKINNER,
United States Court Commissioner for the Western District of Wisconsin.

And afterwards, to wit, on the 11th day of June, 1889, came said plaintiff and filed notice of trial, as follows:

Notice of Trial.

Circuit Court of the United States, Western Dist. of Wisconsin.

20 ELIAB W. METCALF, Plaintiff,
vs.
THE CITY OF WATERTOWN, Defendant.

Please take notice that the above-entitled action will be brought to trial and an inquest taken therein at the special term of the aforesaid court, to be held at the U. S. court-room, in the city of Madison, in the said district, on the 19th day of June, 1889, at the opening of court on that day or as soon thereafter as counsel can be heard.

Yours, &c.,

C. E. MONROE,
Plaintiff's Att'y.

June 7, 1889.
To Messrs. G. W. Bird & D. Hall, att'ys for defendant.

Service of copy of above notice admitted this 10th of June, 1889.

D. HALL,
G. W. BIRD,
Att'y- for Def't.

Note of issue in the above-entitled cause.
C. E. MONROE, *Pl'ff's Att'y.*
D. HALL &
GEO. W. BIRD, *Def'ts Att'y-.*

Issue of fact for court, joined June 7, 1889, filed by plaintiff's attorney.

And afterwards, to wit, on the 2nd day of August, 1889, came the parties aforesaid, by their attorneys, and filed written stipulation waiving jury trial, as follows:

Stipulation Waiving Jury Trial.

United States Circuit Court, Western District of Wisconsin.

ELIAB W. METCALF, Plaintiff,
vs.
THE CITY OF WATERTOWN, Defendant.

21 Now come the parties above named, by their respective attorneys of record, and hereby stipulate and agree that the issues of fact in the above-entitled action may be tried and determined by the court without the intervention of a jury, trial by jury being hereby waived.

Dated this 2nd day of August, A. D. 1889.

C. E. MONROE,
Attorney for the Plaintiff.
GEO. W. BIRD,
DANIEL HALL,
Attorneys for the Defendant.

And said cause having afterwards, to wit, on said 2nd day of August, 1889, come on to be tried by the court, without a jury, and evidence having been offered by the plaintiff, and counsel having been heard in behalf of the said parties, and the court being fully advised in the premises, the court, on said 2nd day of August, 1889, made and filed its findings of facts and conclusions of law, as follows:

Findings of Fact and Conclusions of Law.

United States Circuit Court, Western District of Wisconsin.

ELIAB W. METCALF, Plaintiff,
vs.
THE CITY OF WATERTOWN, Defendant.

A jury having been duly waived herein by written stipulation signed by counsel of both parties, duly filed, and this action having been duly brought to trial before this court, without a jury, at the June term thereof for the year 1889, upon the issues joined by the complaint and answer herein, the following findings
22 of fact and conclusions of law are hereby made and filed herein by the court and the judge thereof, to wit:

Findings of Fact.

1. That at a stated term of the circuit court of the United States in and for the then district of Wisconsin, begun and held at the city of Milwaukee, on the second Monday, being the ninth day, of April, 1866, one Pitkin C. Wright, then plaintiff, recovered a judgment, which was fully given by said last-mentioned court against the said defendant, the said City of Watertown, upon the 8th day of May, A. D. 1866, for the sum of ten thousand one hundred and fifty

dollars and forty-six cents ($10,150.46), damages, together with the sum of fifty-seven dollars and forty cents ($57.40), costs and disbursements of the action, amounting in all to the sum of ten thousand two hundred and seven dollars and eighty-six cents ($10,207.86), in an action at law upon contract, wherein the said Pitkin C. Wright was plaintiff and the defendant above named was defendant.

2. That afterwards, to wit, on the 24th day of April, 1872, the said Pitkin C. Wright, for a valuable consideration, duly assigned twenty-five sixty-firsts of said judgment to one Fanny Beach Ely; and afterwards, to wit, on the 24th day of August, 1872, for a valuable consideration, the said Pitkin C. Wright duly assigned fifteen sixty-firsts of said judgment to one Samuel S. Beach; and afterwards, to wit, on the 8th day of August, 1873, for a valuable consideration, the said Pitkin C. Wright duly assigned all the remaining portion of said judgment to the said Fanny Beach Ely and Samuel S. Beach jointly, giving each an equal undivided half interest in said remaining portion of said judgment.

23 3. That afterwards, to wit, on the 30th day of August, 1873, the said Fanny Beach Ely and Samuel S. L. Beach, then being the owners of the whole of said judgment, for a valuable consideration duly assigned the whole of said judgment to Eliab W. Metcalf, the plaintiff in this action, and that said Eliab W. Metcalf is now and was at the time of the commencement of this action the owner of said judgment and of the whole thereof.

4. That all of the above-mentioned assignments were filed in the office of the clerk of the circuit court of the United States in and for the eastern district of Wisconsin, at the city of Milwaukee, on the 8th day of September, 1873.

5. That the above-mentioned Samuel S. Beach departed this life, intestate, on the 22nd day of July, 1874, being at the time of his decease a resident of the city of Chicago and State of Illinois and a citizen of said State of Illinois; that he left surviving him his widow, Bena C. Beach, and a son, an only child, named Samuel C. Beach, both of whom were on said 22nd day of July, 1874, ever since have been, and now are residents of said city of Chicago and citizens od said State of Illinois, and that no executor or administrator has ever been appointed upon the estate of the said Samuel S. Beach.

6. That the present action was commenced on the 29th day of June, 1883, and not before, and was not commenced within ten years from the time the cause of action herein accrued.

Conclusions of Law.

1. That the cause of action set out in the complaint herein did not accrue within ten years next before the commencement of this action.

2. That this action is and at the time of its commencement was barred by the statute of limitations.

24 3. That the defendant is entitled to judgment herein; that the plaintiff take nothing by his action, and that the defend-

ant go thereof without day, and that the defendant have and recover his costs of this action to be taxed.

Dated Madison, Wis., August 1st, 1889.

By the court:

R. BUNN,
District Judge.

And afterwards, to wit, on said 2nd day of August, 1889, judgment was duly entered in said cause as follows:

Judgment.

United States Circuit Court, Western District of Wisconsin.

ELIAB W. METCALF, Plaintiff,
vs.
THE CITY OF WATERTOWN, Defendant.

The præcipe herein having been filed and the summons herein having been issued and placed in the hands of the marshal for service on the 29th day of June, 1883, and copies of said summons having been delivered—one to Henry Bieber, city clerk, and one to Charles H. Gardner, city attorney, and one to Fred. Kusel, the last elected chairman of the board of street commissioners of said city, on the 2nd day of July, 1883—and the defendant having duly appeared herein on the 23rd day of July, 1883, and demanded a copy of the complaint herein, and the said complaint having been duly served on the defendant's attorneys on the 7th day of August, 1883, and the defendant's answer to said complaint having been duly served on the plaintiff's attorney on the 18th day of August, 1883, and plaintiff's replication to said answer having been served on
25 defendant's attorneys on the 8th day of December, 1883, and the said replication having been duly returned to the plaintiff's attorney by the defendant's attorneys on the 8th day of December, 1883, and the said replication having been duly stricken from the files of this court upon motion of the defendant and stipulation of parties made in open court on the 2nd day of December, 1884, and a jury having been duly waived by a written stipulation of the parties duly made and filed herein, and this action having been brought to trial upon the issues joined by said complaint and answer at the December term of this court for the year 1884, to wit, on the 2nd day of December, 1884, before the court, without a jury, Justice Bunn, district judge, presiding; and the case having been taken under advisement, and the court having announced its decision on the 17th day of January, 1885, finding in favor of the defendant on its plea of the bar of the statute of limitations, and the clerk of this court having entered such decision on page 11, Law Docket B, incorrectly, as follows: "On consideration it is ordered that plaintiff's demurrer to defendant's answer be overruled, and judgment goes for defendant;" and a stay of proceedings and motion for a new trial and reargument before the full bench having been entered herein on the 26th day of January, 1885, and notice

of motion for a new trial and leave to amend the said complaint having been served by plaintiff's attorney on defendant's attorneys on the 10th day of April, 1885, and the said several motions having been duly heard and argued before this court at the December term thereof for the year 1884, to wit, on the 21st day of April, A. D. 1885, Justices Gresham and Bunn presiding; and the same having been then duly denied, and the said entry of the clerk on page 11, Law Docket B, having been, by order of the court, duly corrected on said
21st day of April, 1885, so as to read, "On consideration
26 the court finds for defendant on its plea of the statute of
limitations. Let the proper finding be prepared accordingly and judgment go thereon for the defendant;" and the court having duly made and filed its written findings of fact and conclusions of law on the 21st day of April, 1885, wherein it was found, among other things, as conclusions of law that the cause of action set out in the complaint herein did not accrue within ten years before the commencement of this action, and that this action is and at the time of its commencement was barred by the statute of limitations, and that the defendant is entitled to judgment herein; that the plaintiff take nothing by his action, and that the defendant *fo* thereof without day, and that it have and recover of the plaintiff the costs of this action, to be taxed; and judgment having been accordingly entered on the 22d day of April, 1885, pursuant to said findings and order, and the plaintiff having removed the same to to the Supreme Court of the United States for review by writ of error, and the said judgment having been reversed by the said Supreme Court on the sole ground that the circuit court had no jurisdiction to enter the judgment by reason of insufficient allegations of citizenship in the complaint, and the mandate of the Supreme Court having been duly filed in this court, and the plaintiff having served and filed his amended complaint containing sufficient allegations of citizenship to give the circuit court jurisdiction of the case, and the defendant having duly made and filed its answer to said amended complaint, and issue thus joined having been duly brought to trial at the June term of the said circuit court for the year 1889, to wit, on the 2nd day of August, 1889, and a written stipulation of the parties having been filed waiving a trial by jury,
and the cause having been on that day duly tried by the
27 court without a jury, and the court having made and filed
its findings, wherein it finds for the defendant upon the plea of the statute of limitations, and ordered judgment to be entered accordingly for the defendant:

Now, therefore, on motion of George W. Bird and Daniel Hall, attorneys for the said defendant*m*, it is hereby ordered and adjudged that the plaintiff take nothing by his action and that the defendant go thereof without day, and that the defendant, The City of Watertown, have and recover of the plaintiff, Eliab W. Metcalf, the sum of seventeen dollars and seventy-five cents, the costs and disbursements of this action.

Dated August 2d, A. D. 1889.

By the court.

Judgment-roll signed August 2, 1889.
Costs, $17.75.

F. M. STEWART, *Clerk.*

And on said 2nd day of August, 1889, came said plaintiff and filed his writ of error, hereto annexed.

And on the same day, to wit, said 2nd day of August, 1889, came the plaintiff and filed security on error, as follows:

Bond on Writ of Error.

Know all men by these presents that we, Eliab W. Metcalf, of Elyria, Ohio, and Frederick N. Finney, of Milwaukee, Wisconsin, are held and firmly bound unto The City of Watertown, in the State of Wisconsin, in the full and just sum of ($250.00) two hundred and fifty dollars, to be paid to the said City of Watertown, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this second day of August, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a session of the circuit court of the
28 United States in and for the western district of Wisconsin, in a suit depending in said court between the above-named Eliab W. Metcalf, as plaintiff, and the above-named City of Watertown, as defendant, a final judgment was rendered against the said Eliab W. Metcalf, and the said Eliab W. Metcalf having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said final judgment in the aforesaid suit, and a citation directed to the said City of Watertown, citing and admonishing it to be an- appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Eliab W. Metcalf shall prosecute said writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ELIAB W. METCALF. [s'L.]
FREDERICK N. FINNEY. [s.]

Wit. for E. W. M.:
W. V. METCALF.
L. H. M. UPTON.

Wit. for F. N. F.:
C. E. MONROE.
J. F. LA BOULE.

Approved by—
R. BUNN, *Dist. Judge.*

And on the same day, to wit, on said 2nd day of August, 1889, came said plaintiff and filed citation in error, hereto annexed, with admission of service endorsed thereon.

And afterwards, to wit, on the 19th day of August, 1889, came plaintiff and filed assignment of errors, hereto annexed:

29 In the Supreme Court of the United States.

ELIAB W. METCALF, Plaintiff in Error,
vs.
THE CITY OF WATERTOWN, Defendant in Error.

Assignment of Errors.

And now comes Eliab W. Metcalf, the plaintiff in error above named, by C. E. Monroe, his attorney, and files this his assignment of errors, and says that in the record and proceedings aforesaid and also in the giving of the judgment aforesaid there is manifest error in this, to wit:

That the second defence or plea to said action set forth in the answer aforesaid of the said City of Watertown and the matters therein contained are not sufficient in law to bar or preclude the said Eliab W. Metcalf from having and maintaining his aforesaid action thereof against the said City of Watertown nor sufficient to sustain said judgment.

There is also error in this, to wit, that the said special findings of facts of the said circuit court and the matters therein contained are not sufficient in law to bar or preclude the said Eliab W. Metcalf from having and maintaining his aforesaid action thereof against the said City of Watertown nor sufficient to sustain said

30 judgment.

There is also error in this, to wit, that the said finding of the said circuit court in favor of the said defendant upon its plea of the statute of limitations is not sufficient in law to bar or preclude the said Eliab W. Metcalf from having and maintaining his action aforesaid against the said defendant nor sufficient to sustain said judgment.

There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said City of Watertown against the said Eliab W. Metcalf, whereas by the law of the land the said judgment ought to have been given for the said Eliab W. Metcalf.

Wherefore the said Eliab W. Metcalf prays that the judgment aforesaid, for the errors aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment.

C. E. MONROE,
Attorney for Plaintiff in Error.

31 *Citation.*

The United States of America to The City of Watertown, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington

on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States in and for the western district of Wisconsin, wherein Eliab W. Metcalf is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Romanzo Bunn, district judge, sitting as judge of the circuit court of the United States in and for said western district of Wisconsin, this 2 day of August, A. D. 1889.

R. BUNN,
District Judge, Sitting as Judge of the Circuit Court of said District.

Due and personal service of the foregoing citation by delivery to us of a copy of the same is hereby admitted this 2nd day of August, A. D. 1889.

GEO. W. BIRD,
D. HALL,
Attorneys of Record for The City of Watertown, Defendant in Error.

[Endorsed:] Supreme Court of the United States. Eliab W. Metcalf, plaintiff in error, *vs.* The City of Watertown, defendant in error. Citation. Filed Aug. 2, 1889. F. M. Stewart, c'k. C. E. Monroe, att'y for pl'ff in error.

32 UNITED STATES OF AMERICA, } *ss:*
Western District of Wisconsin, }

Seal U. S. Circuit Court, Western Dist. of Wisconsin.

I, F. M. Stewart, clerk of the circuit court of the United States in and for the western district of Wisconsin, do hereby certify that I have compared the foregoing "transcript of record" with the original records of said court now remaining of record in my office in the case therein lately pending of Eliab W. Metcalf, plaintiff, *vs.* The City of Watertown, defendant, and that the same is a true, full, and perfect transcript of the record in said case and of the whole thereof, except original complaint, answer, replication, findings of fact, conclusions of law, and judgment, which are not transcribed, as specified in within transcript of record.

I further certify that the writ of error and citation in error, with admission of service thereon, and the assignment of errors hereto annexed are the original writ of error, citation in error, and assignment of errors heretofore filed in my office in said case by the plaintiff above named.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Madison, in said district, this 24 day of August, in the year of our Lord one thousand eight hundred and eighty-nine,

and of the Independence of said United States the one hundred and fourteenth.

F. M. STEWART,
Clerk of said Court.

Endorsed on cover: W. Wisconsin C. C. U. S. No. 412. Eliab W. Metcalf, plaintiff in error, *vs.* The City of Watertown. Filed September 7, 1889.

Supreme Court of the United States

ELIAB W. METCALF, PLAINTIFF IN ERROR,

vs.

THE CITY OF WATERTOWN.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an action upon a judgment recovered by one Pitkin C. Wright in the United States Circuit Court for the then District of Wisconsin, against the City of Watertown, in that state, on the 8th day of May, 1866. The amount recovered was $10,207.86. This judgment, by a series of assignments, afterwards became the property of Eliab W. Metcalf, the plaintiff in the present action, which was commenced in June, 1883. The citizenship of the plaintiff, as well as that of the parties through whom his interest is derived, is set out in the complaint and in the findings of the Court below and is such as to give the Circuit

Court jurisdiction of this action. The defense relied on is the fact, not disputed, that the action was not brought within ten years after the rendition of the judgment sued on, or as the answer puts it: "That the cause of action stated in the complaint did not accrue within ten years next before the commencement of the action"—the defendant taking the position that the action is barred on account of this delay under the provisions of the Wisconsin statute of limitations. A trial by jury was waived by written consent of both parties, duly filed, and the cause was tried by the Court, without the intervention of a jury, on the 2d day of August, 1889. Special findings, setting out more in detail the facts which are concisely stated above, were made by the Court; and upon these findings judgment was signed in favor of the defendant; the Court thus sustaining the defendant's construction of the state statute of limitations. This judgment is now brought before this Court, by the plaintiff, for review, by writ of error.

ASSIGNMENT OF ERRORS.

Upon this record it is assigned as error that the defense or plea of the statute of limitations and the facts upon which it is based are not sufficient to constitute a defense to the action, nor to sustain a judgment in favor of the defendant; and that upon the facts set forth in the findings of the Court, judgment should have been given for the plaintiff.

THE ARGUMENT.

There has never been in this case any real controversy over the facts. The only question involved is a question of law. The validity of the claim sued on is not denied. The

only defense is that it is barred by the statute of limitations. The defendant maintains that the action was brought too late, because it was not brought within ten years after the recovery of the judgment. The plaintiff, on the other hand, insists that he had twenty years in which to sue, and that, his action having been commenced within that time, he is entitled to judgment.

The statutes upon which this question arises are the following:

Wisconsin Revised Statutes of 1858, Ch. 138:

Section 1. Civil actions can only be commenced within the periods prescribed in this chapter, except when in special cases a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited can only be taken by answer.

Section 14. The periods prescribed in Section 1 of this chapter for the commencement of actions other than for the recovery of real property, shall be as follows:

Section 15. Within twenty years:—

1. An action upon a judgment or decree of any court of record of this state.

2. An action upon a sealed instrument, when the cause of action accrues within this state.

Section 16. Within ten years:—

1. An action upon a judgment or decree of any court of record of any state or territory within the United States, or of any court of the United States.

2. An action upon a sealed instrument, when the cause of action accrued without this state.

Also the following:

Upon any judgment which has heretofore been or may

hereafter be rendered or docketed in any court of record in this state, execution may be issued at any time within five years after the rendition or docketing thereof, and alias executions may be issued thereon at any time thereafter. But in cases where no execution has been issued within said five years, execution shall only be issued upon leave granted by the court or a judge thereof, or a county judge, or court commissioner, and such leave shall not be granted by any such court or officer, unless it appears to his satisfaction, by the affidavit of the party, his agent or attorney, that the judgment or some part thereof remains unsatisfied and due; *provided*, that no execution shall issue, nor any action or proceedings be had upon any such judgment after twenty years from the time of the rendition or docketing thereof.

Laws of 1866, Chapter 14; Laws of 1868, Ch. 11.

The Wisconsin statutes were again revised in 1878, but the later revision expressly declared that in any case where a limitation upon any right of action, prescribed by any act which was thereby repealed, had begun to run, the act repealed should be held to continue in force as to causes of action which accrued before the revision went into effect. This changed the earlier rule in Wisconsin, which was that the right to bring an action was controlled by the limitation law in force at the time the action was brought. So that the statutory provisions quoted above are the ones which furnish the rule for this case.

R. S. 1878, § 4984.

R. S. 1858, Ch. 191, Sec. 13.

Two questions arise under these acts; the first as to their meaning, the second as to their validity.

A.

The meaning of the law.

Section 15, of Chapter 138, R. S. 1858, prescribes a limit of twenty years for "an action upon a judgment or decree of *any court of record of this state.*"

The act of 1866, as amended in 1868, permits executions to be issued at any time "upon any judgment which has heretofore been or may hereafter be rendered or docketed in *any court of record in this state*" . . . "provided that no execution shall issue, nor any action or proceedings be had *upon any such judgment* after twenty years from the time of the rendition or docketing thereof."

It is not easy to see why Section 15 of the Revised Statutes, standing by itself, is not broad enough to include the present action.

The Circuit Courts of the United States, sitting within the limits of a state, are, in a very important sense, courts of that state:—

1. Because they are *located in the state.* Their jurisdiction extends to and is bounded by the limits of the state, their process, ordinarily, does not go beyond the state. Their judgments are liens on real property within the state. Their jurors are citizens of the state. Their sessions are in the state.

2. Because one of their principal duties, from the earliest times down to the present day, has been to enforce the laws of the state and to determine the rights and liabilities of parties under those laws. Their jurisdiction is concurrent with that of the state courts in the great majority of all the cases brought before them.

3. Because they have over and over again, by judicial decision, been declared to be domestic courts in the state in which they sit. It has been so declared by the Supreme Court of the State of Wisconsin.

"The only other material question in the case is whether the plaintiff, having obtained his judgment in the Circuit Court of the United States for the Eastern District of Wisconsin, can avail himself of this statutory remedy"—providing for an action against an insolvent corporation *by a judgment creditor* after execution returned unsatisfied.—"It is contended by the learned counsel of the appellant that the return of an execution on a judgment in a federal court will not sustain this action, and that such a judgment is that of a foreign court, or the same as one of a sister state. There may have been late decisions to such effect, but the current of authorities, as well as the laws of the United States and of this state, establish the rule that the judgments of the United States Courts of the Wisconsin Districts are to be treated as domestic judgments of a Superior Court of this state. *They are treated in all respects as to remedies like domestic judgments of the state within which they were rendered.* . . United States Courts are not foreign within the state where they are held. . . We are disposed to adopt this rule, so well established, as against any adverse decisions, as it appears more in the spirit of comity and reasonable. In this proceeding the judgment of the plaintiff will have the same effect as if rendered by any Superior Court of this state, because it was rendered in a Wisconsin District of a United States Court."

Ballin *vs.* Loeb, 78 Wis., 404, 413.

"In no just sense can it"—the Circuit Court of the United States for the District of Minnesota—"be regarded as a foreign tribunal, or as holding the same relation to the government of this state as is held by the courts of a sister state. . . In the determination of all questions properly brought before it for adjudication it must take

cognizance of and have reference to the same laws, state and federal, that are binding upon the state courts in the disposition of like questions presented for their decision. Its judgments rendered in this district are operative throughout the state and may be enforced by execution anywhere within its boundaries. . . . No good reason occurs why its judgments ought not to be placed on the same footing with the domestic judgments of superior courts of record of our own state and treated accordingly; and such is undoubtedly the true rule. *In respect to this class of domestic judgments*, whenever their validity is sought to be impeached in any collateral proceeding, the better rule, in our opinion, requires jurisdiction to be conclusively presumed, unless the contrary affirmatively appears upon the face of the record itself."

Turrell *vs.* Warren, 25 Minn., 9, 14 (cited in Ballin *vs.* Loeb, *supra*).

"The first contention of plaintiffs is . . . that the United States Circuit Court in and for the District of Minnesota is not a court of record of this state. We think the point is not well taken. A federal court, sitting within the territorial limits of the state, is regarded as a domestic court, and its judgments as domestic judgments. Both state and federal courts in the state enforce and give effect to the same laws. The federal courts issue writs of attachment and garnishee process under and in accordance with the statutes of the state. In view of the scope and purpose of this insolvent law, we think that the Circuit Court of the United States in and for the District of Minnesota *is a court of this state*, within the meaning of the act referred to."

Simon *vs.* Mann, 33 Minn., 412.

In the case just cited, words identical with those of our statute were under consideration, and were held to in-

clude the United States Circuit Court for the District of Minnesota.

In another case, the words "any court of this commonwealth,"—*i. e.*, Pennsylvania—were held to include the federal courts in Pennsylvania.

Ex parte Schollenberger, 96 U. S., 369.

The domestic character of the federal courts in the states in which they sit has so often been asserted by this Court as to make any quotation from its decisions unnecessary.

Claflin *vs.* Houseman, 93 U. S., 130, 137.
Turnbull *vs.* Payson, 96 *id.*, 418, 423.
Tennessee *vs.* Davis, 100 *id.*, 257, 271.

But Section 15 of the Revised Statutes does not stand by itself. The acts of 1866 and 1868, in force when this action was brought, relate to the same subject. They furnish a rule, perfectly independent of the Revised Statutes, for the limitation of actions on all judgments rendered in the state, and their language is too plain to admit of any difference of opinion. They authorize the issue of executions "upon any judgment rendered in any court of record in this state," at any time subsequent to its rendition, with this addition, that no such execution shall issue "*nor any action or proceeding be had upon any such judgment* after twenty years from the time of rendition thereof."

These acts do not make any reference to the Revised Statutes of 1858. They do not purport to repeal them. Under our construction they are perfectly consistent with them. They authorize executions to issue and actions to be brought upon judgments of all courts of record in the state, for a period of twenty years after the

rendition of the judgment. So far as they relate to actions their provisions are a re-enactment of the prior law or a legislative declaration of what the law was at the time of their passage. So far as they relate to executions, their provisions are new. They relieve any doubt which might have existed on that subject. They expressly authorize the issue of executions on all judgments rendered in the state for twenty years after their rendition. We do not see how defendant's interpretation can stand for a moment in face of this fact. They would present us with the curious spectacle of judgments barred as causes of action by the statute of limitations, yet enforcible by execution for ten years after that. We do not believe that the Legislature intended any such consequences.

An act quite similar to the foregoing, enacted by the Legislature of Virginia, was construed by this Court in 1839, the question being whether the provisions relating to executions were anything more than regulations of process, in which case, as the rule then stood, they would not have been binding in the federal courts. But it was held to be a limitation act, and the following language was used in regard to it:

"Why does not this statute apply to the federal courts? It limits actions and executions on judgments rendered in the state courts; *and the same rule must be applicable to judgments obtained in the Courts of the United States.*"

Ross *vs.* Duval, 13 Pet., 45, 61.

Counsel for the defendant choose to ignore all the provisions which we have just been considering and insist that Section 16 of the Revised Statutes of 1858, which prescribes a limitation of ten years for actions "upon a judgment or decree of any court of record of any state or

2. An action upon a sealed instrument, *when the cause of action accrues within this state.*

Section 16. Within ten years:

1. An action upon a judgment or decree of any court of record of any state or territory within the United States, or of any court of the United States.

2. An action upon a sealed instrument, *when the cause of action accrued without this state.*

The latter half of the two sections shows pretty plainly that the construction for which we contend is the right one; that the line drawn by the Revised Statutes is a territorial one; and that it was intended to put in one class all causes of action, whether upon judgments or specialties, which accrue within the state, and in another class all causes of action, both upon judgments or specialties, which accrue without the state. The interpretation for which defendant contends, puts judgments of the federal courts of Wisconsin on a lower footing than deeds and bonds upon which a cause of action has accrued within the state. This does not seem in harmony with the purpose of the act and does not accord with the uniform and undisputed course of legislation in Wisconsin, both prior to and since the revision of 1858.

The Revised Statutes of 1849 contain no such discrimination; neither do the Revised Statutes of 1878. Before 1858 a limitation of twenty years was prescribed for actions upon all judgments of record, wherever rendered, and upon all specialties, wherever the cause of action accrued.

R. S. 1849, Ch. 127, Sections 14, 20, 41.

The Revised Statutes of 1878 contain the following provisions:

Section 4219. The following actions must be com-

menced within the periods respectively hereinafter prescribed after the cause of action has accrued:

Section 4220. Within twenty years:

1. An action upon a judgment or decree of any court of record of this state, or of the United States, sitting within this state.

2. An action upon a sealed instrument when the cause of action accrues within this state [with an exception relating to municipal bonds, for which a six-year limitation is imposed].

Section 4221. Within ten years:

1. An action upon a judgment or decree of any court of record of any other state or territory of the United States, or of any Court of the United States, sitting without this state.

2. An action upon a sealed instrument when the cause of action accrued without this state [with a similar exception relating to municipal bonds].

The Revision of 1858, if its language is doubtful, may be explained by reference to both the prior and subsequent law.

"When it becomes necessary to construe language used in the revision which leaves a substantial doubt of its meaning, the original statutes may be resorted to for ascertaining that meaning."

Sutherland, Statutory Construction, § 156.

"Where a doubt exists as to the meaning of a statute, the pre-existing law and the reason and purpose of the new enactment are considerations of great weight."

Id., § 162.

"Where statutes are 'revised,' as is common in our states, to render them more convenient and plain, the re-

vision is to receive the interpretation which had been given to the old laws, except where the contrary intention affirmatively appears."

Bishop, Statutory Crimes, § 98.
U. S. *vs.* Bowen, 100 U. S., 508.
McDonald *vs.* Hovey, 110 *id.*, 619, 629
U. S. *vs.* Ryder, *ib.*, 729, 739.

This rule has been frequently recognized in Wisconsin, where it has often been held that the provisions of the Civil Code of 1856, broken up and scattered through the different chapters of the Revised Statutes of 1858, and sometimes appearing in most incongruous connections, were to receive the same interpretation as before.

State *ex rel.* Atty.-Gen. *vs.* Messmore, 14 Wis., 115, 118.
Smith *vs.* Smith, 19 *id.*, 522.

The provisions of Sections 4219–4221 of the Revised Statutes of 1878 may be used in a similar way. They are not to be taken as changing the prior law, but as declaring its meaning in plainer language. They are the interpretation, by the Legislature, of the prior law; and as they do not discriminate between state and federal judgments, we may believe that the prior law did not intend to discriminate either.

Mead *vs.* Bagnall, 15 Wis., 156, 160.
Mundt *vs.* S. & F. du L. R. R. Co., 31 *id.*, 451, 463.

It is proper, further, to consider the fact that there is not to be found upon the statutes of any other state in the Union, relating to the limitation of actions, another instance where a discrimination of this sort has been attempted. A careful examination of all the statutes con-

tained in the appendices of Angell's and Wood's works on "Limitations" fails to disclose a single instance of such discrimination. This is a fact to which attention may properly be called; for the limitation laws of all the states embrace substantially the same subjects; and there is no special reason for such a discrimination in Wisconsin that should render its limitation laws peculiar in this respect.

Angell on Limitations, p. 14.
Harrington *vs.* Smith, 28 Wis., 43, 66.

But there are other considerations upon which we may lay stress in opposing the interpretation which the defendant seeks to put upon the law—considerations of policy, of reasonableness, of the motives which must be attributed to the state Legislature in the enactment of such a law as defendants claim has been passed. The Circuit Courts of the United States are not alien courts, nor are they inferior to the state courts. They have a rank and dignity co-ordinate with that of the highest state courts. They pass on the same questions as the state courts. Their judgments, like those of the state Supreme Court, are reviewable by no other tribunal except the Supreme Court of the United States.

But the law in question, under defendant's interpretation of it, is a covert assault upon the authority of the federal courts. It discriminates against them in such a way as to deprive them of part of their efficiency. It makes their judgments less valuable than those of the state courts. It exhibits an unfriendly feeling toward the national tribunals and an unreasonable jealousy of their authority. It discourages resort to them by those persons for whose protection, largely, they were called into existence and in whose behalf their powers are most frequently

exerted—citizens of other states than Wisconsin. Whether the Legislature has power to make such a discrimination is a question which will be considered further on. For the present it is enough to say that it is a question of grave doubt.

Such motives and such an exercise of power are not to be lightly attributed to the Legislature, and an interpretation which implies them is to be avoided, if possible.

Bishop, Statutory Crimes, §§ 82, 90.
Blunt *vs.* Walker, 11 Wis., 334, 346.
U. S. *vs.* Kirby, 7 Wall., 482, 486.

We should not have devoted so much time to this branch of our argument but for the fact that this question has been left in an unsettled state by the decisions in Wisconsin.

Up to the time when the present action was commenced, the judgments of the federal courts in Wisconsin had always been understood to be governed by the same rule as those of the state courts. This was settled by a decision in the United States Circuit Court in 1870, in a case where the ten-year limitation was pleaded in bar of an action upon a federal judgment. A certified abstract of this case has been procured and filed in this Court. It reads as follows:

"Circuit Court of the United States for the District of Wisconsin.

Presiding, the Honorable Thomas Drummond, Circuit Judge, and the Honorable Andrew G. Miller, District Judge.

Merritt T. Cole *vs.* Henry A. Weil and another.

This was an action of debt, commenced the thirty-first day of March, 1870, upon a judgment recovered on the second day of December, 1856, by Daniel C. Hyde and

another, against the same defendants in the then District Court of the United States for the District of Wisconsin, and afterwards assigned to this plaintiff.

To this action each of the defendants pleaded the statute of limitations as follows: 'And says that the said plaintiff ought not to have and maintain his aforesaid action thereof, against him, because he says that the said action was not commenced within ten years next succeeding the recovery or rendition of the said judgment in the declaration in this action mentioned and declared upon.' The plaintiff demurred to these pleas, and the matters contained in them, as not being sufficient in law to bar or preclude him from having or maintaining his said action. Then comes the following entry in the record of the case:

'June 30, 1870. This day came the parties by their counsel, and the demurrers of the plaintiff to the several pleas of the defendant being argued and submitted: On consideration thereof, it is ordered by the Court that the said demurrers be and and are hereby sustained and that the said defendants plead over by the first Monday of August, next, or their default will be entered.'

The defendants failing to plead over, judgment was afterwards taken against them by default.

EASTERN DISTRICT OF WISCONSIN: ss.

I hereby certify the above statement to be correct. Witness my hand, and the seal of said court at [SEAL.] Milwaukee, this twenty-third day of December, 1887.

EDWARD KURTZ, Clerk."

While the present action was pending in this Court upon writ of error, an action was brought in one of the state circuit courts against the Town of Waterloo, in

the same county as the City of Watertown, upon several causes of action, one of which was a judgment obtained almost twenty years before by the plaintiff's testator in the United States Circuit Court for the District of Wisconsin. This action was commenced in August, 1886, and was carried through the state courts with such expedition that it was on the calendar of the Supreme Court of the state at the August term for the year 1887, and a decision was rendered in it by that court on the twentieth day of September in that year. It is there decided that the statute which governed that case and this did intend to discriminate against the judgments of the federal courts of the state, and limited the time for bringing actions upon them to ten years, while it allowed twenty years for suing upon judgments of the state courts.

Waterman, Admx. *vs.* Waterloo, 69 Wis., 260.

It is to be noticed that the only statutory provisions under consideration in that case were those of Sections 15 and 16 of the Revised Statutes of 1858. *The law of 1866 and 1868 was not brought to the attention of the court.* Neither was the question of the power of the Legislature in the premises considered. We do not think this decision, opposed, as it is, to the earlier doctrine of the United States Court, and under the circumstances under which it was rendered, can be regarded as settling the meaning of the Wisconsin law, or as binding upon the federal courts. It would seem, too, not to be in harmony with the latter case of Ballin *vs.* Loeb, already cited.

When a cause has been once brought into a federal court, unfettered by decisions of the state courts, it is the duty as well as the right of the former to exercise its own

independent judgment upon all the questions involved in the case, and this duty and power are not superseded by a subsequent decision in a state court. If this were not so the federal courts would be the mere registers of the opinions of the state courts. Cases might be gotten up in the state courts for the very purpose of anticipating the decision of cases pending in the federal courts, and citizens of other states, resorting to the federal courts, might thus be deprived of that protection from local passion or prejudice which they have a right to expect from those tribunals.

Carroll County *vs.* Smith, 111 U. S., 556, 562, 563.
Pease *vs.* Peck, 18 How., 595, 598.
Burgess *vs.* Seligman, 107 U. S., 20, 33–35.
Levy *vs.* Stewart, 11 Wall., 244.

But independently of such considerations it is doubtful whether this question is one which could be settled by state decisions so as to preclude its independent consideration by the federal courts.

It is only in matters of purely local law that state decisions are regarded as controlling; and by local laws are meant such laws as primarily and mainly affect the rights and interests of the state or some part of it, or of its inhabitants or some portion of them. Where nothing more than this is involved, the settled decisions of the state courts are followed by the federal courts.

But the present case is not one of this sort. The law under discussion primarily and mainly affects the authority of courts which have been established by Congress and the rights of litigants therein. The interpretation of this law involves a consideration of the nature and character of the federal courts under the Constitution of the United States, and the relation of those courts to the state

where they are situated. Such a question is not a mere local matter. It is of national importance and concern. It involves considerations of public policy reaching far beyond the limits and interests of a single state. Whenever such questions have been involved, this Court has always exercised the right to put its own interpretation not only upon state laws but even upon state constitutions, even where a different construction had already been put upon them by the state courts.

U. S. *ex rel. vs.* Muscatine, 8 Wall., 575, 584.
Levy *vs.* Stewart, 11 *id.*, 244.
Olcott *vs.* Fond du Lac Co., 16 *id.*, 678, 689.
Mohr *vs.* Manierre, 101 U. S., 417, 421—overruling Mohr *vs.* Tulip, 40 Wis., 66, but accepted and followed in Mohr *vs.* Porter, 51 Wis., 487.
Clark *vs.* Bever, 139 U. S., 96, 116.

And in any case where the validity of a state law is in question under the Constitution or laws of the United States, this Court has always felt at liberty to put its own interpretation upon the law.

Wo Lee *vs.* Hopkins, 118 U. S., 356.
Norton *vs.* Shelby County, *ibid.*, 425, 440.
Gormley *vs.* Clark, 134 *id.*, 338, 348.

We therefore ask this Court to pass upon the meaning of the state limitation law; and if the interpretation we contend for is upheld by it, it will obviate the necessity of considering the further question of the validity of this law.

B.

The validity of the law.

But if the interpretation placed upon the law by defendant's counsel is the one which the Legislature intended

should be put upon it, then we take the position that the law, so interpreted, is invalid under the Constitution and laws of the United States for two reasons:

First. On general principles, as an attempt to legislate upon matters outside of the realm of state action.

Second. For the more specific reason that it attempts to discriminate between the agencies of the state and those of the United States, to the prejudice of the latter, and to the prejudice of certain interests especially committed to them.

The law is outside of the province of state legislation, for two reasons:

I. Because it is an attempt to define and control the powers of the federal courts.

II. Because it is an attempt to limit and define rights of persons conferred by the Federal Government.

The more specific objections above referred to also resolve themselves into two, viz.:

III. That it discriminates against the federal courts in favor of those created by the state.

IV. That in so doing it deprives citizens of other states of rights specially conferred on them by the Constitution and laws of the United States.

The provisions of the Constitution which are involved are the following:

Art. 1, Sec. 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Art. 1, Sec. 8, Cl. 18. The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof.

Art. 3, Sec. 1. The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

Art. 3, Sec. 2. The judicial power shall extend to controversies between citizens of different states.

Art. 4., Sec. 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Art. 6, Cl. 2. This Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land.

Those laws of the United States are also involved which have given effect to the foregoing provisions by ordaining and establishing the Circuit Courts, and conferring upon them the jurisdiction and powers which they now possess.

I.

The law is void as the exercise of a power of supervision and control over the federal courts which does not belong to the Legislature of any state.

The argument will be best stated in the language of this Court.

"The federal courts are instruments competently created by the nation for national purposes. The states can exercise no power over them or their proceedings, except so far as Congress shall allow."

United States *vs.* Thompson, 98 U. S., 486, 490.

The same principle has been asserted in relation to the national banks, in language equally applicable to the national courts.

"The national banks are instruments designed to be used to aid the Government in the administration of an

important branch of the public service. They are means appropriate to that end. Being such means, brought into existence for this purpose and intended to be so employed, the states can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may see proper to permit.

"This principle is indispensable to the efficiency, the independence, and, indeed, to the beneficial existence of the General Government; otherwise it would be liable, in the discharge of its most important trusts, to be annoyed and thwarted by the will or caprice of every state in the Union."

Farmers' and Mechanics' Nat. Bank *vs.* Dearing, 91 U. S., 29, 33;

Bank of Commerce *vs.* Commissioners of N. Y. City and County, 2 Black, 620, 632.

The leading case upon this question lays down the same principle, in general terms, as follows:

"The states have no power, by taxation or otherwise, to retard, impede, burden, or in any way control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the Federal Government."

McCullough *vs.* Maryland, 4 Wheat., 316, 436.

Repeated decisions of this Court have also determined that "State laws, whether general, or enacted for the particular case, cannot, in any manner, limit or affect the operation of the process or proceedings in the federal courts."

U. S. *ex rel.* Riggs *vs.* Johnson County, 6 Wall. 166.

Rio Gr. R. Co. *vs.* Gomila's ex r., 132 U. S., 478.

And see

Watkins *vs.* Tarpley, 18 How., 517, 520.

The judicial powers of the United States are vested in the courts which they have created. Their powers are derived from the National Government, and their nature and extent are to be determined exclusively by its laws. Like all courts, they speak, and enforce their decisions, only through their judgments. The effect which these shall have, and the length of time for which they shall be operative must both be beyond the control of the states. Otherwise the agencies of the judicial department of the general Government are at the mercy of the states.

II.

The law is void because it attempts to define and limit rights which have been conferred by the Federal Government, and which are therefore subject to the control of Congress alone.

In the majority of cases the rights which the courts are called on to enforce arise under state laws and are regulated by them. But other rights may be conferred by the National Government, and these are beyond the reach of state legislation.

Gibson *vs.* Chouteau, 13 Wall., 92.

For this reason the salaries of federal officials and corporate franchises conferred by Congress, it is held, cannot be taxed by the states.

Dobbins *vs.* Erie County, 16 Pet., 435, 449, 450.
California *vs.* Cent. Pac. R. Co., 127 U. S., 1, 40, 41.

When a judgment has been recovered in any court, prior rights are merged in the judgment and new ones are conferred by it.

Bishop on Contracts, § 877;
Bangs *vs.* Watson, 9 Gray, 211.

If the court which rendered the judgment derived its powers from the state, then the new rights which attach to that judgment are conferred by the state. But where the court is created and its powers conferred by Congress, then the rights which grow out of its judgments are conferred by Congress and so come within that class of rights which is outside of state interference.

Factors' & Traders' Ins. Co. *vs.* Murphy, 111 U. S., 738, 741, 743.

No doubt it is true, in a general way, that rights conferred by Congress may be affected, or even, to a certain extent, defined by the general law of the state. When Congress has established courts having authority to render judgments, it is not obliged to go farther and declare what it means by the word "judgment," nor to specify all the rights attaching to their judgments. The word is already defined by the general law of the state; and the nature and extent of the rights conferred by federal judgments will be, for the most part, and without any special provision, the same as those which attach to the judgments of the state courts. The state laws affect them, not as *federal judgments*, but simply as *judgments*. That is as far as state laws can go. They cannot set these apart in a class by themselves and declare that such and such rights shall attach to them and no others. They cannot prescribe a limitation upon actions to enforce federal judgments different from the limitation on actions on judgments of the state courts, nor, indeed, put any limitation upon them as a distinct class by themselves. That is beyond the reach of their legitimate power.

The nature of the interaction of federal and state laws, and the effect which the latter may have upon the former in matters where the authority of Congress is supreme,

may be illustrated by a reference to some of the "interstate commerce" decisions. These cases hold that the power to regulate commerce between the states, given to Congress by the Constitution, belongs to Congress alone; that the states have no authority over the subject; and that even in the absence of regulation by Congress "interstate commerce" is free from state control. At the same time they concede that these matters are affected by the general laws of the state to this extent, that the ordinary rights of passengers and shippers and the ordinary liabilities of common carriers are defined and governed by state law; also that the general police power of the state extends over persons and things engaged in this traffic until supplanted by Congressional legislation. But it is denied that any of the interests which are by the Constitution put within the protection and under the power of Congress, can be *directly acted upon, as such*, by special laws enacted by the state legislatures.

Sherlock *vs.* Alling, 93 U. S., 499, 102.
Robbins *vs.* Shelby Taxing Dist., 120 *id.*, 489, 493.
Smith *vs.* Alabama, 124 *id.*, 465, 473.

We maintain, then, that the state has no power, by express legislation, to put any limit upon the time within which actions may be brought upon the judgments of the federal courts, even in the state courts; that the effect which federal judgments are to have, and the time within which they may be enforced by action or otherwise, is for Congress alone to decide; the reason being that this is a matter affecting the authority and dignity as well as the usefulness of the federal courts as instruments of the National Government.

III.

But even if we were to admit the power of the state, by express legislation, to include the judgments of the federal

courts in its general provisions, so long as no special restriction is placed upon them, we should still maintain that the law in question is void on account of the discrimination which it makes between the state and the United States courts.

In a very important class of cases the jurisdiction of the federal courts is concurrent with that of the state courts. The bulk of litigation in the Circuit Courts is of this class. They pass on the same questions, follow the same rules, give the same relief, have the same powers as the state courts. It was plainly intended that they should have an authority and rank as great as those of the state courts. But the relative rank and dignity of courts are, in great measure, determined by the length of time during which their judgments may be enforced. Thus, in Wisconsin, judgments of courts of record are suable for a period of twenty years; those of courts not of record only for six years. By limiting the time for bringing actions upon the judgments of the federal courts to ten years they are assigned an intermediate rank between the two, higher than justice courts, lower than the state courts of general jurisdiction. They are placed on the footing of foreign courts. That their relative authority and efficiency are thus lowered there can be no question. A judgment in the federal court is not as valuable as one in the state court. The case comes within the principle declared in cases involving the construction of state laws giving to judgments the effect of liens upon real estate. The rule is laid down in the following language:

"In those states where the judgment or the execution of the state court creates a lien only within the county in which the judgment was entered, it has not been doubted that a similar proceeding in the Circuit Court of the United States would create a lien to the extent of its jurisdiction.

Any other construction would materially affect and in some degree subvert the judicial power of the Union. It would place suitors in the state courts in a much better condition than in the federal courts."

Massingill *vs.* Downs, 7 How., 760, 766; and see Phelps *vs.* O'Brien County, 2 Dillon, 518.

The rule that statutes are not to be construed in such a way as to place the federal courts at a disadvantage relatively to the state courts is not restricted to cases of lien laws. The same principle ought to be applicable to state limitation laws having the same effect.

IV.

The law is void for the further special reason that it is an attempt to deprive citizens of other states of rights secured to them by the Constitution of the United States.

The citizens of every state are entitled to all privileges and immunities of citizens in the State of Wisconsin. They have a right to demand of every branch of the state government the same privileges and immunities which citizens of Wisconsin can demand of it. They have the same rights in the state courts as citizens of the state have. That is to say, no discrimination can be made against them in the state courts, or anywhere else in the state, on account of their citizenship.

"It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it prohibits discriminating legislation against them by other states. It has been justly said that no

provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

The privileges and immunities secured to citizens of each state in the several states by the provision in question are those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens."

Paul *vs.* Virginia, 8 Wall., 168, 180.

"The constitutional provision alluded to did not create those rights which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state government over the rights of its own citizens. Its sole purpose was to declare to the several states that, whatever those rights as you grant or establish them to your own citizens, or as you limit, or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

Slaughter House Cases, 16 Wall., 36, 77.

Illustrations of the rule sufficient for our present purpose may be found in those cases which declare that state laws, taxing in a particular way the products of other states, or putting burdens upon their sale, or discriminating in any way against the commercial privileges of citizens of other states, are repugnant to this clause of the Constitution, as well as to the one which gives Congress power to regulate commerce between the states.

Woodruff *vs.* Parham, 8 Wall., 123, 147.

Ward *vs.* Maryland, 12 *id.*, 418, 430.

Howe Machine Co. *vs.* Gage, 100 U. S., 676, 679.
Oliver *vs.* Washington Mills, 11 Allen, 268, 281.

The right to bring actions in the state courts is one of the privileges guaranteed by this clause of the Constitution.

Cooley's Constitutional Limitations (5th ed.), 492.
Cole *vs.* Cunningham, 133 U. S., 107, 114.

It is possible that a state limitation law might be directly obnoxious to the requirements of this clause.

A law which should enact that citizens of other states suing in its courts, must sue within half the time allowed to its own citizens would be void. A law enacting that citizens of other states must bring actions upon judgments which they have recovered within the state within half the time allowed to its own citizens to bring such actions, would also be clearly void. Such discriminations would be too glaringly opposed to the Constitution as it has been interpreted by this Court to stand for a moment.

But there are other and less direct methods by which citizens of other states may be deprived of their constitutional rights. That jealousy or prejudice which the Legislature is forbidden to yield to may exert its influence upon the courts created by the state to such an extent that they may not be safe tribunals for the protection of the rights secured by this provision of the Constitution. To guard against this danger, the judicial power of the United States was extended to controversies between citizens of different states, and jurisdiction in such cases conferred by Congress on the Circuit Courts concurrent with that exercised by the state courts. The sole object of that provision and one of the principal objects in view in the creation of the Circuit Courts was that there might be in each state tribunals independent of and therefore unaffected by local and popular

prejudices, where citizens of other states might be sure to obtain the same rights which they ought to be able to assert as effectively in the state courts. And in furtherance of the object for which this jurisdiction is given to the federal courts Congress has, in the Judiciary Act, adopted those state laws which prescribe general rules for the government of the state courts and made them rules of decision in the federal courts in all cases where they apply, in order that all cases within this concurrent jurisdiction might be governed by one uniform rule, whether the action be brought in the state or in the federal courts.

The object of the federal courts being, then, to secure to citizens of other states, not different, but the same rights which the state courts ought to grant them, a state law which makes it impossible for the former to grant the same rights which can be conferred by the latter is not only a blow at the authority of the federal courts, but is an invasion of the rights of citizens of other states intended to be secured to them by the Constitution and laws of the United States. One of the rights secured to them in the state courts is to obtain judgments of equal value and enforcible for the same length of time as the judgments *obtained there* by citizens of the state. But if they have that right in the state courts, then they have the right to obtain judgments of the same value and enforcible for the same length of time in the federal courts. The effect of the Wisconsin limitation law, therefore, is to prevent their obtaining in the federal courts rights which they are entitled to demand in the state courts, and, that being so, the law is void as depriving citizens of other states of rights which they enjoy under the Constitution.

It is no answer to this to say that the law makes no reference to citizens of other states and that it was therefore not intended to violate the rights of citizens of other

states. For the effect of the law is certainly to impair their rights; and the intention of a law is ascertained by its effect.

Henderson *vs.* Mayor of N. Y., 92 U. S., 259, 268;
Soon Hing *vs.* Crowley, 113 *id.*, 703.
Morgan's R. R. & S. S. Co. *vs.* Louisiana, 118 *id.*, 455, 462.
Minnesota *vs.* Barber, 136 U. S., 313, 319, 320.

We shall better realize the force of this objection if we consider a little further the consequences of a different conclusion. It is admitted that there is a discrimination, but it is contended that it is not one of which anybody need complain, for the reason that the time allowed gives a reasonable opportunity for enforcing the judgments of the federal courts; and we are reminded of the numerous cases in which very short periods have been supported as reasonable limitations upon rights of action. This is, no doubt, the general rule. But can we safely admit that it is the rule which governs in this case? We think not.

It was held in one case that a limitation of nine months and seventeen days was not unreasonably short; and other limitations, little less stringent, have been sustained in other cases.

Terry *vs.* Anderson, 95 U. S., 628, 632.

On the other hand, there may be circumstances under which no limitation whatever can be regarded as reasonable, as in actions brought by the United States. And what is reasonable in one class of actions may not be reasonable in another. Different interests may be involved and the whole question may have to be considered from an entirely different point of view. So in the case at bar the reasonableness of the limitation depends upon consid-

erations very different from those which were involved in the case just cited. If the law limited actions on state judgments to twenty years and on federal judgments to nine months and seventeen days, would not the latter be clearly unreasonable? Why? On account of the grossness of the discrimination. But what rule is there to determine what decree of discrimination is reasonable and what unreasonable? How shall we know where to stop, or where to draw the line? *Must not any discrimination be unreasonable?*

C.

Opposing Arguments Considered.

In opposition to the argument which has just been presented it is urged that statutes of limitations relate only to the remedy, and merely establish what circumstances shall be taken as evidence that a contract has been performed; and under this view of the case it is said no one can complain that his rights are in any way affected.

If this were a correct statement of the law as it is held in Wisconsin, we do not see how it could aid the defendant. For a rule of evidence which establishes a conclusive presumption of payment within ten years, in the case of federal judgments rendered within the state, while there is no such presumption in the case of state judgments till they have run twenty years, is certainly open to the objection that it discriminates against the federal courts and against the privileges, immunities and rights of suitors in those courts.

But it is not true that the Wisconsin statute of limitations is nothing but a rule of evidence, or that it relates merely to the remedy. The courts in that state have given it a much more far-reaching effect, as will appear by a brief reference to some of the decisions.

"*It was not designed to affect, alter or modify any rule of evidence, nor to create any new rule. Its object is not to furnish evidence that demands six years old have been paid or satisfied, but to close the judicial tribunals against their prosecution.*"

Pritchard *vs.* Howell, 1 Wis., 131, 137.

"It was long since settled with respect to the statute of limitations of this state that as to parties residing herein *it does not affect the remedy merely but directly destroys the right itself* after the time prescribed by it has once elapsed."

Brown *vs.* Parker, 28 *id.*, 21, 27.

"These cases settled the question for this court as to the effect which the statute of limitations has upon the right of the holder of a debt or demand against another against whom it has run. *Not only the right to maintain an action for the recovery of the debt is taken away, but the debt itself is extinguished.*"

Peirce *vs.* Seymour, 52 *id.*, 272, 277.

The foregoing decisions furnish an answer also to the contention of the defendant that the state statute of limitations does not attempt anything more than to furnish rules for the government of its own courts—this being coupled with the assumption that the state has power to lay down the rules for the government of its own agents, and therefore has power to prescribe the time within which actions, for whatever cause, may be brought in its own courts. For if the debt itself is extinguished it follows that the right of action is absolutely destroyed, and the federal, as well as the state, courts must be closed against its prosecution.

But the power of the state to lay down the rules for the government of its own agents has an important qualification. It exists only as to those matters in which the

state is supreme and independent of other authority. But in its relations to the United States, and in matters coming within the protection or supervision of the Constitution and laws of the United States, the state is not supreme, nor independent, but subordinate, and its power to act, and to prescribe rules for the action of its agents is subject to important restrictions.

If the state had absolute power in all cases to prescribe the time within which actions could be brought in its own courts, its statutes of limitation would run against the United States; a doctrine which has always been emphatically denied.

Gibson *vs.* Chouteau, 13 Wall., 92.
U. S. *vs.* Thompson, 98 U. S., 486.
U. S. *vs.* N., C. & St. L. R'y Co., 118 *id.*, 120.

It would follow, too, from such a doctrine, that the state courts could not be subjected to limitations prescribed by any other authority than the state. But it seems that in all cases in which the state and federal courts have concurrent jurisdiction Congress may prescribe the limitations upon actions for both courts.

Mitchell *vs.* Clark, 110 U. S., 633.

In certain cases, also, Congress has prower to add exceptions to the limitation laws of the states which will prevent their statutes of limitations from running; and the state courts are compelled to recognize such exceptions.

Stewart *vs.* Kahn, 11 Wall., 493.
Mayfield *vs.* Richards, 115 U. S., 137.

Indeed, in respect to all matters coming within their concurrent jurisdiction, the power of the state is so completely subordinate to that of the United States that it has been held that the jurisdiction conferred upon the state

courts in such matters by state laws may be wholly taken away from them by Congress, and made exclusive in the Courts of the United States.

The Moses Taylor *vs.* Hammons, 4 Wall., 411, 419.

The doctrine contended for is equally contradicted by the decisions of this Court upholding acts of Congress which authorize the removal of actions begun in the state courts to the federal courts, even where the state laws have attempted to prevent such removal.

C. & N. W. R'y Co. *vs.* Whitton, 13 Wall., 270.

Even in cases where the state itself is the plaintiff.

N. O., M. & T. R. R. Co. *vs.* Mississippi, 102 U. S., 135.

And even in criminal prosecutions for offenses against the state in certain cases where a justification under the laws of the United States is relied on as a defense.

Tennessee *vs.* Davis, 100 U. S., 257.

Strauder *vs.* West Virginia, *ib.*, 303.

In view of these decisions it is useless to contend that the power of the state to prescribe rules for the government of its own courts can be exercised without limitation or restriction in cases where rights of the United States or rights conferred by the United States are at stake.

We deny, then, that the states have power, by virtue of any reserved or sovereign authority of their own, to prescribe the period for bringing actions upon judgments rendered by the federal tribunals. If they claim such power they must show some other authority for it; and the only source from which such authority can be derived must be a clear and unmistakable grant in the Constitution of the United States or the laws enacted by Congress

But if such authority has been conferred upon the states we may be very sure that it has not been conferred without such restrictions and limitations as to make it impossible that it should be exercised to the prejudice or injury of the federal courts, or of private persons who have resorted to those courts for the enforcement of their rights.

As an illustration of the care with which Congress has guarded the instruments of the national Government from the possible effects of state hostility or jealousy, we refer the Court to the protections thrown around holders of shares of stock in the national banks. These shares are not subject to taxation by the states without the consent of Congress. That consent has been given, but subject to the express restriction "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens."

U. S. Revised Statutes, § 5219.

Merc. Nat. Bank of N. Y. *vs.* Mayor of N. Y., 121 U. S., 138.

But it is said that this law, as a limitation law, is included in that class of laws which Congress has recognized and declared to be binding as rules of decision in the federal courts, in Section 34 of the Judiciary Act of 1789 and Section 721 of the Revised Statutes.

This section reads as follows:

"The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

It is claimed that the effect of this act upon the state law now under consideration is the "same as if there were

a separate act of Congress prescribing in so many words a ten-year limitation for this action."

But if we are right in our position that the state law is void even as a rule for the government of the state courts it cannot be contended that it is adopted as a rule for the government of the federal courts by this act; unless counsel mean to take the position that this act enlarges the power of the state, and gives it the right to legislate upon matters, which, if it had never been passed, would be outside of the legitimate province of state legislation and solely within that of Congress.

It is doubtful whether Congress can enlarge the powers of state legislatures in this way, by delegating its own authority to them. But whether this can be done or not, it certainly has not been done by this act.

"The state is not bound by general statutory provisions whereby any of its prerogatives, rights, titles, or interests would be impaired unless by express words. Statutes in derogation of a sovereign right are to be strictly construed."

Bishop, Statutory Crimes, § 103.
Sutherland, Statutory Construction, § 386.
The Delaware R. R. Tax, 18 Wall., 206, 225.

Section 721 of the Revised Statutes comes within this rule of strict construction. It is not to be taken as waiving sovereign prerogatives or rights. It is not a delegation of powers which properly belong only to Congress. It was not intended to put the courts or other instrumentalities of the national Government in a position of inferiority to those of the states. It was not intended to confer new powers on the states, nor to add new force to state laws. Its main object was to aid in defining the jurisdiction of the Federal courts, in cases involving the

rights of parties under state laws, and it is not at all certain that it is anything more than the recognition by Congress of a principle of law which would have been recognized by the courts if it had not been put in the form of a statute.

Wayman *vs.* Southard, 10 Wheat., 1, 48.
United States *vs.* Reid, 12 How., 361, 363.

But Section 34 of the Judiciary Act contains an express exception and an express qualification which put beyond doubt the intention of Congress in respect to state legislation.

"The laws of the several states, *except where the Constitution, treaties or statutes of the United States otherwise require or provide,* shall be regarded as rules of decision in trials at common law in the courts of the United States, *in cases where they apply.*"

This Court has never permitted such a construction of this statute as would in any way affect injuriously the jurisdiction, or powers, or authority of the federal courts, or put suitors in the federal courts in a worse position than suitors in the state courts. In any such cases, state laws, however valid otherwise, *do not apply.*

Massingill *vs.* Downs, 7 How., 760, 766.
Union Bank of Tennessee *vs.* Jolley's Admrs., 18 How., 503, 507.
Hess *vs.* Reynolds, 113 U. S., 73, 77.
Clark *vs.* Bever, 139 U. S., 96.
Mercer County *vs.* Cowles, 7 Wall., 118, 121.

And see

Phelps *vs.* O'Brien County, 2 Dillon, 518.

But there is a special reason in this case for holding that the ten-year limitation does not apply to an action brought in a federal court upon one of its own judgments,

and that is, that under the general law of the state execution may issue upon the judgments of the federal courts at any time within twenty years after their rendition.

Wis. L., 1866, Ch. 14.
Wis. L., 1868, Ch. 11.
Ross *vs.* Duval, 13 Pet., 45, 61.

Under the general state law the time within which actions may be brought and executions issued out of the state courts on their own judgments is the same; but under the peculiar view of the law taken by defendant's counsel a different rule is laid down for the federal courts, and the periods within which actions may be bought and executions issue on their judgments are not the same. Such a result is absurd; and a law which would bring about such an absurdity cannot be regarded as a rule of decision in an action in the federal court, *for the reason that it does not apply.*

We beg leave to refer here to the convincing argument of Senator Edmunds, in the opinion printed at the end of this brief, for a further discussion of the purpose and effect of this section of the Judiciary Act.

The cases cited by counsel for the defendant in which this Court has upheld the validity of state laws prescribing a shorter limitation upon actions on judgments rendered in other states than upon the judgments of its own courts, do not sustain the position they ask this Court to take in this case.

The judgments of the courts of other states are foreign judgments in every sense except that under Article IV, Section 1, of the Constitution full faith and credit are to be given to them as judgments. If it were not for this requirement no state would be compelled to give such

judgments any recognition whatever. Even now the judgments of courts of other states rank only as simple contract debts when questions of priority of claims arise in the settlement of insolvent estates.

McElmoyle *vs.* Cohen, 13 Pet., 312.
Cole *vs.* Cunningham, 133 U. S., 107, 112.

But the relations between the United States and the states is very different from those existing between the different states, and the federal courts within any state are upon a very different footing from the courts of other states. The Supreme Court of Wisconsin has stated this relation very clearly in the case already referred to in this brief.

"The judgments of the United States Courts of the Wisconsin Districts are to be treated as domestic judgments of a superior court of this State."

Ballin *vs.* Loeb, 78 Wis., 404, 413.

There is no case cited by the defendant which supports the position that a state law, discriminating as this one does between the state and the federal courts, is a valid exercise of state power.

For these reasons we ask that the judgment of the Circuit Court be reversed, and that this cause be remanded with directions to render judgment in favor of the plaintiff in error for the amount of his claim.

Respectfully submitted,
CHARLES E. MONROE,
Attorney for the Plaintiff in Error.

WASHINGTON, D. C.

E. W. METCALF, ESQ.

DEAR SIR:

I have considered the matter of the Wisconsin Statute of limitations as applied to the judgments of the United States Courts in that State. The statute of Wisconsin of 1858 declares:

SECTION 14. The periods prescribed in section one of this chapter for the commencement of actions other than for the recovery of real property, shall be as follows:—

SECTION 15. Within twenty years:—

"1. An action upon a judgment or decree of any court of record of this state.

SECTION 16. Within ten years:—

"1. An action upon a judgment or decree of any court of record of any state or territory within the United States, or of any court of the United States."

The Statutes of the United States provide (Sec. 721, Rev. Stats.) that: "The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." This was the original provision of the Judiciary Act of 1789.

A judgment rendered in the Circuit Court of the United States in the District of Wisconsin on the 8th day of May, 1866, was sued in the same Circuit Court of the United States more than ten years and less than twenty years after its rendition. A plea of the statute of limitations of Wisconsin was put in alleging that the suit was not commenced within ten years after the rendition of the judgment and the question was thereon raised whether the limitation of ten years in respect of judgments in the courts of the United States of that state as related to or compared with the limitation of twenty years on judgments of her own courts was valid; or if valid, whether the Wisconsin statute applies to the case in the sense of the statute of the United States (R. S. Sec. 721) before cited.

I.

Does not the Constitution of the United States "require" that no state shall make any discrimination against the judgments of the courts of the United States in that state either as to methods of execution or remedy by suit upon them?

It may be safely assumed that it is not within the constitutional competence of any state law to limit, regulate, or in any way to affect the proceedings or judgments of the courts of the United States when such judgments, etc., are brought into consideration in a court of the United States. The only effect, therefore, that a statute of Wisconsin can have in respect of a suit in a United States court in that state, on a judgment of its own, must be such as may have been given to it by a law of the United States making the state law the rule of decision in such a case.

II.

The second and final question then is, has the statute of the United States in these words: "The laws of the several states, except where the constitution, treatises, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply"—conferred on the state the right to make laws that in any respect whatever apply different and more onerous rules or limitations in respect of the judgments of the courts of the United States in that state, than those rules and limitations that by the statutes of Wisconsin are applied to the judgments of her own state courts.

The mere statement of the question should be its sufficient answer. In such a case even the plainest and most positive language of a United States statute upon the subject should be construed—per force if need be—to preclude such a construction; for such a construction would be an abdication of sovereignty and a substitution of servitude for it. But the act of 1789 (R. S. Sec. 721) before cited, needs no forced construction or limitation to avoid the adversely discriminating statute of Wisconsin. It provides with consummate wisdom and skill, not an inflexible rule of obedience to state statutes, but a *guide* for the United States courts founded—consistently with the supreme law and power of the United States—upon the grounds upon which the jurisprudence and statutes of particular states may be in respect of their own institutions and courts and so that if in one state the judgments of its own courts were to have certain effects and be pursued in certain ways and within certain limitations of time, the United States courts should apply the same rules to their own proceedings and judgments—nothing more. The rule was and must have been intended to be that whatever was the state law applied to the conduct and course of

the judgments of its own courts should be the guide, within constitutional limits, for the action of the courts of the United States —nothing more—in proceedings in respect of judgments of the courts of the United States in that state. The very structure of the constitution and of the national government requires that the judgments of its courts in a state shall stand on as good a footing in its own courts—to say nothing of the state courts—as state court judgments do in the courts of that state.

The statute of Wisconsin, therefore, which requires suits to be brought on the judgments of the United States courts within ten years, while suits on the judgments of the state courts may be brought within twenty years, is not within the act of congress (Sec. 721, R. S.); for the constitution of the United States *requires* that the judgments of its own courts, when sought to be enforced in its own courts, shall not be subject to a defense that in the same state would not be good in a state court in a suit upon a similar judgment of a court of the state.

III

In such a case the statute of the state does not "apply". The state laws named in the act of Congress are evidently meant to be those that make the local law, in respect of local autonomy and as applied to state judgments and procedures, the rule of decision and is meant to say that whatever is—subject to the constitution and laws of the United States—the law of the state in respect to its own institutions and procedures dealing with state subjects and state judgments shall be the guide of procedures and judgments in courts of the United States in that state; but not to allow discriminative and hostile state laws to operate adversely to anything that the courts of the United States may have decided or to the remedies that are to be invoked for enforcing them in United States Courts.

Upon these considerations I am of opinion that the plea in the case you have submitted to me of the Wisconsin statute of limitations is not good.

Very truly yours,

GEO. F. EDMUNDS.

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CLERK.

153-671

SUPREME COURT OF THE UNITED STATES,

October Term, 1891.

NO. 412.

ELIAB W. METCALF, Plaintiff in Error,

vs.

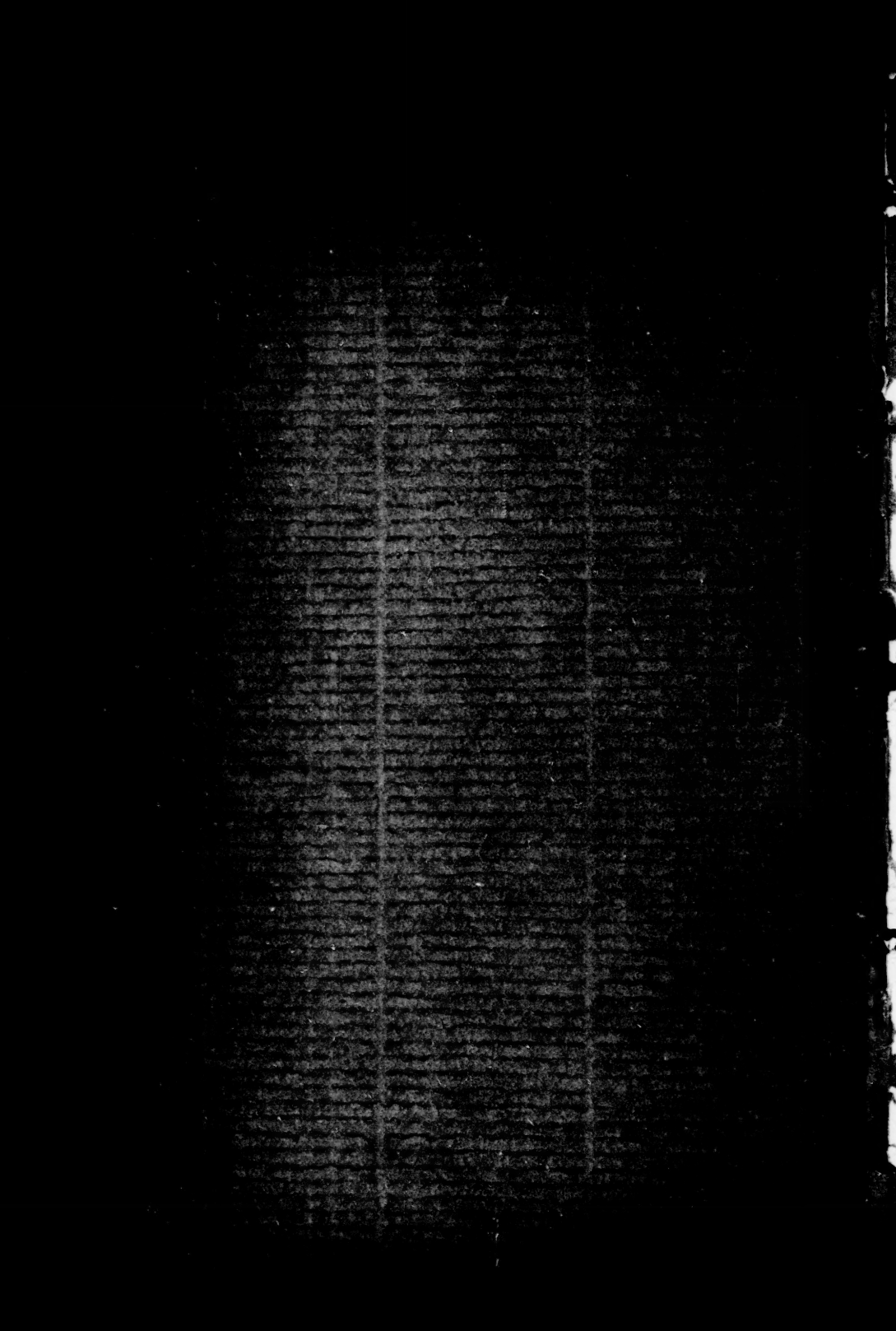
THE CITY OF WATERTOWN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

G. A. JENKS,
of Counsel for Plaintiff.

JOHN MCMURRAY & SONS, PRINTERS, BROOKVILLE, PA.



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THE CITY OF WATERTOWN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

Supplemental Brief of Plaintiff in Error.

Statement of Facts.

On the 8th day of May, 1866, the Plaintiffs Assignor obtained judgment against the defendant in the Circuit Court of the United States of the district of Wisconsin for $10,207.86. [R. P. 15–16.]

On the 29th day of June, 1883, suit was brought in this case in the same court on that judgment to recover the amount thereof and interest. [R. P. 3.]

On the 13th day of June, 1889, the defendants pleaded the Statute of Limitations of the State of Wisconsin, as a bar to the action. [R. P. 13.]

In pursuance of a written stipulation filed the issues of fact were tried by the court, whose 6th finding [R. P. 16] is, "that the present action was commenced on the 29th day of June, 1883, and not before, and was not commenced within ten years from the time of the cause of action herein accrued."

As a conclusion of law the court found the action was barred by the Statute of Limitations and entered judgment for the defendant. This finding and the judgment thereon are assigned for error.

Brief of Argument.

I.

AS THE JUDGMENT UPON WHICH THIS ACTION WAS FOUNDED WAS RENDERED WITHIN THE STATE OF WISCONSIN, THE LIMITATION OF THE RIGHT OF ACTION BY THE STATUTE OF WISCONSIN IS TWENTY YEARS AND NOT TEN.

In 1849 the Legislature of Wisconsin enacted :–Section 41. "Every judgment and decree in any court of the United States, or any State or Territory of the United States, shall be presumed to be paid and satisfied at the expiration of twenty years after the judgment or decree was rendered."

In 1858 it was enacted as follows:–Section 14. "The periods prescribed in section 1 of this chapter for the commencement of actions other than for the recovery of real property shall be as follows:

"Section 15. Within twenty years.

"1st. An action upon a judgment or decree of any court of record of this State.

"2nd. An action upon a sealed instrument when the cause of action accrues within this State.

"Section 16. Within ten years.

"1st. An action upon a judgment or decree of any court of record of any State or Territory within the United States, or of any court of the United States.

"2nd. An action upon a sealed instrument, when the cause of action accrues without this state."

This limitation was re-enacted by a revision of the statute in 1878, as follows: "Section 4220, within twenty years:

"1st. An action upon a judgment or decree of any court of record of this state or any court of the United States sitting within this state.

"2nd. An action upon a sealed instrument when the cause of action accrues within this state, except those mentioned in section 4222.

"Section 4221. Within ten years.

"1st. An action upon a judgment or decree of any court of record of any other State or Territory of the United States or of any court of the United States sitting without this state.

"2nd. An action upon a sealed instrument when the cause of action accrues without this state, except those mentioned in the next section."

Section 721 R. S. provides that "the laws of the several states except when the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as the rules of decision, in trials at common law in the courts of the United States, where they apply."

By virtue of this section, when applicable, the laws of the several states became local rules of decision, in the several courts of the United States, sitting in each of the several states.

The State Laws by virtue of the State enactment as such, have no efficiency in the Federal Courts. They derive their force as Federal Rules of Action only from the statute last quoted. It establishes as many different systems of local laws as there are States. Each system is limited to a place, defined by the boundaries of a state. The applicability is dependent upon the place in which the court sits. Place, then, is one of the controlling elements of the applicability of state laws. The state has no power to pass any laws to control the judgments of the United States Courts. Congress made effectual in the United States Courts the laws which the state passed for its own courts, and not what laws the state might wrongfully enact for courts of the United States.

As the judgment upon which this action is founded was obtained in 1866, the statute of 1858 is applicable to it. In applying that statute sections 15 and 16 must be considered. We maintain that paragraph first of section 15 is applicable to this case. That section provides, "an action upon a judgment or decree of any court of record of this State."

The court in which the judgment was rendered was the Circuit Court of the United States for the District of Wisconsin. The phrase "District of Wisconsin" in the name

of the court in substance signifies the same as the phrase "State of Wisconsin." Substituting the word State for the word District, the court could then be described as the Circuit Court of the United States for the State of Wisconsin. The first part of this name is descriptive of the sovereignty whence the court derives its power. The second describes the place where that power is exercised. If the phrase "judgment or decree of any court of record in this State" is intended to be descriptive of the sovereignty whence the power of the court is derived it would exclude this judgment under this provision; but if it is descriptive of the place where that power is exercised, it would include it.

"A court is defined to be 'A *place* wherein justice is judicially administered.'" [*3d Blackstone's Commentaries, page* 23; *Coke on Littleton, page* 58.]

The Legislature is presumed to have used the word "court" in the phrase quoted in accordance with its legal and technical signification. The place, then, in this legislation, is the controlling thought, rather than the source of power. The legislative intent is, to include any court of record of or within the State of Wisconsin.

This view is strongly corroborated by an analysis of "section 16, within ten years," which was enacted at the same time, as a part of the same statute, the first paragraph of which declares "an action upon a judgment or decree of any court of record of any State or Territory within the United States or any court of the United States."

The state of Wisconsin is a state within the United States.

The phrase then, "any state or territory within the United States" embraces the State of Wisconsin, and includes the same subject matter, as the first paragraph of the 15th section, unless an exception be introduced into the first paragraph of section 16. The exception which would carry out that intent must be an exception which would exclude from the operation of the 16th section the courts within the State of Wisconsin. With that exception, which is necessarily implied, added to the first paragraph of section 16,

that paragraph would then read "an action upon a judgment or decree of any court of record of any State or Territory, or of any court of the United States," except within the State of Wisconsin.

Unless this exception be made, the first section of the 16th paragraph is entirely inconsistent with the first section of the 15th paragraph, and would work a repeal of it.

The revision of 1858 was intended to make a change in the statute of 1849. We contend that the change intended to be made was to make a distinction between actions whose causes accrued within the State of Wisconsin and those which accrued without the state. In the statute of 1849 no such distinction existed. In the statute of 1858 all cases in which the cause of action accrued within the state are provided for in the 15th section. All cases which accrued without the state, in the 16th section. If those two sections be printed without punctuation, as in fact they are printed in legislative enactments, they would read respectively as follows: "Section 15 within twenty years–An action upon a judgment or decree of any court of record of this state" and "an action upon a sealed instrument when the cause of action accrues within this state." If thus printed the phrase "the cause of action accrues within this state" would with perfect propriety apply to the whole section. It would also render the 15th and 16th sections consistent. As the judgment upon which the action in this case is founded accrued within the state of Wisconsin the 15th section would embrace it, and the limitation of twenty years apply to it.

Section 16 printed in the same way would read, "Section 16 within ten years—an action upon a judgment or decree of any court of record of any state or territory of the United States" and "an action on a sealed instrument when the cause of action accrues without the state."

These sections establish beyond question that the change made in the act of 1849 by the act of 1858, turned upon the distinction between actions accruing within the

state and without the state. They also establish strongly, inferentially if not directly, that those accruing within the state are within the provisions of section 15, and of those only accruing without the state are embraced within section 16.

The revision of 1878 sustains this view. Section 4220 of that revision provides, "Within 20 years: 1. An action upon a judgment or decree of any court of record of this state or of the United States sitting within this state. 2. An action upon a sealed instrument when the cause of action accrues within this state, except those mentioned in section 4232."

Section 4221 provides, "Within ten years: 1. An action upon a judgment or decree of any other state or territory of the United States, or any court of the United States without this state. 2. An action upon a sealed instrument, when the cause of action accrues without this state, except those mentioned in the next section."

A general revision of the laws of a state, is not presumed ordinarily to be a change of those laws, but rather a codification, and in some instances a modification to remove supposed or existing ambiguities.

The ambiguities in the statute of 1858 arose in the first paragraph of the 15th section, as to whether or not, the phrase, "any court of record of this state" in that section included the courts of the United States sitting within the State of Wisconsin. That paragraph by the revision of 1878 was freed from the ambiguity by adding the clause, "or of the United States sitting within this state." By the first paragraph of section 4221, the first paragraph of section 16 of the act of 1858 was relieved from the ambiguity by which it would have repealed the first paragraph of the 15th section of that act, by substituting "any *other* state or territory of the United States" for "any state or territory within the United States."

This modification for the purpose of removing the ambiguities, carries out the same legislative intent in the revision that existed in the enactment of 1858, which the revisors recognized as "manifestly proper."

In the case of *Koshkong vs. Burton*, 14th *Otto page* 668, the 15th and 16th sections of the act of 1858 were considered by this court, and the result, as delivered by Harlan, J. recognizes that the 15th section provided for causes of action that accrued within the state, and the 16th section for those that accrued without the state. His language is as follows: "The revision of 1849 was superseded by one made in 1858, which went into operation on the first day of January, 1859. By the latter as modified by an act passed in 1861 civil actions, other than for the recovery of real property, were required to be commenced within the following periods: actions upon judgments or decrees of courts of record in the state, and actions upon sealed instruments, when the cause of action accrued within the state, within twenty years.—R. S. Wis. 1858, C. H. 138, Sec. 15; Actions upon the judgments or decrees of any state or territory of the United States, or courts of the United States, and actions upon sealed instruments, when the cause of action accrued out of the state, within ten years. —Id. Sec. 16."

It is only equal justice that judgments obtained in the same state at the same time and under the same circumstances before courts of record of the same grade, shall have equal force and duration. It is inconsistent with a reasonable presumption that the legislature of Wisconsin in the passage of the act of 1858 intended to make such an unjust discrimination between the courts of the state and those of the United States as is contended for by the defendant. If any ambiguities exist they should be solved in conformity with equality of justice before the law. We contend that a careful, conscientious and reasonable interpretation of this statute of 1858, with this principle in view, brings the plaintiffs cause of action within the provisions of the 15th section, with a limitation of twenty years.

II.

THE CONSTRUCTION OF THE STATUTE OF WISCONSIN OF 1858 CONTENDED FOR BY THE DEFENDANTS, WOULD RENDER IT UNCONSTITUTIONAL AND VOID.

1st. *To sue in the courts of the United States is one of the privileges of a citizen of the United States and of a state.*

Before and at the time the Constitution of the United States was formed, each of the confederated colonies had, as to every other, in a great degree, been regarded, in fact and in law, as an independent nation. The general rights of sovereignty were vested in the colonies and states. Each as to every other, was as to its sovereign rights, largely a foreign nation. That the citizens of these *quasi* foreign nations might have a tribunal in common in which each suitor might have an equal power over the organization of the court, and an equal share in the control of its administration, was demanded. That state or local advantage, prepossession, or prejudice might be avoided, was a necessity. A recognition of this demand and of this necessity were obviously required to be incorporated into that constitution, by which the more perfect Union was to be formed. To meet these public requirements the second section of the third article of the constitution provided: "That the judicial power of the United States * * shall extend to cases in law and equity * * between citizens of different states."

In the discussion of this clause of the constitution in the Virginia convention, John Marshall said: "The honorable member objects to suits being instituted in the federal courts by the citizens of one state, against the citizens of another state. Were I to contend that this was necessary in all cases, and that the government without it would be defective, I should not use my own judgment. But are not the objections to it carried too far? Though it may not in general be absolutely necessary, a case may happen, as has been observed, in which a citizen of

one state ought to be able to recur to this tribunal to recover a claim from the citizen of another state. What is the evil which this can produce? Will he get more than justice there? The independence of the judges forbid it. What has he to get? Justice! Shall we object to this, because a citizen of another state can obtain justice without applying to our state courts? It may be necessary with respect to the laws and regulations of commerce, which Congress may make. It may be necessary in cases of debt and some other controversies. In claims for land it is not necessary, but it is not dangerous. In the court of which state will it be instituted? said the honorable gentleman. It will be instituted in the court of the state where the defendant resides, where the law can come at him, and no where else. By the laws of which state will it be determined? said he. By the laws of the state where the contract was made. According to those laws, and those only, can it be decided. Is this a novelty? No; it is a principle in the jurisprudence of this commonwealth. If a man contracted a debt in the East Indies, and it was sued for here, the decision must be consonant with the laws of that country. Suppose a contract made in Maryland where the annual interest is at six per centum, and a suit instituted for it in Virginia; what interest would be given now, without any federal aid? The interest of Maryland, most certainly; and if the contract had been made in Virginia, and suit brought in Maryland, the interest of Virginia must be given, without doubt. It is now to be governed by the laws of that state where the contract was made. The laws which governed the contract at its formation govern it in its decision. To preserve the peace of the Union only, its jurisdiction in this case ought to be recurred to. Let us consider that, when citizens of one state carry on trade in another state, much must be due to the one from the other, as in the case between North Carolina and Virginia. Would not the refusal of justice to our citizens from the courts of North Carolina, produce disputes between the states? Would the federal judiciary swerve from their duty in order to give partial and unjust decisions?" [*3rd Elliot's Debates*, 556–557.]

In the Pennsylvania Convention James Wilson said "Impartiality is the leading feature in this constitution; it pervades the whole. * * * But when we consider the matter a little further, is it not necessary, if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort? I would ask how a merchant must feel to have his property lie at the mercy of the laws of Rhode Island? I ask further how will a creditor feel who has his debts at the mercy of tender laws in other states? It is true that, under this constitution, these particular iniquities may be restrained in future; but, sir, there are other ways of avoiding payment of debts. There have been instalment acts, and other acts of a similar effect. Such things, sir, destroy the very sources of credit. * * * At present how are we circumstanced? Merchants of eminence will tell you that they cannot trust their property to the laws of the state in which their correspondents live. Their friends may die, and may be succeeded by a representative of a very different character." [2*nd Elliot's Debates*, 491–492.]

By the clause of the constitution quoted, a common tribunal is provided for, in which litigants residing in different states, who are now citizens of the United States, may meet on common and equal ground, where each may know that no local influence, laws or power, will prejudice his cause before the court. The suits must be brought, under this clause in the courts of the United States where the defendant resides, or where he may be found; but not in the court which derives its power from the state of which the defendant is a resident. The jurisdictions is not exclusive in the courts organized by the United States. The courts organized by the states have concurrent jurisdiction. But the plaintiff, being a citizen of the United States, and of a different state from the defendant, is by the constitution guaranteed the right or privilege to choose between the courts which are organized by the United States and those which are organized by the state in which the defendant is found. This right or privilege to choose

is one of the privileges and immunities of every citizen of the United States, and of a state when a dispute arises between citizens of different states. The right is a relative one, because it "results from and is posterior to the formation of states and societies." [1*st Blackstone's Commentaries P.* 124.] But its importance is sufficiently indicated by the fact, that it is embodied in the constitution and enforced by many legislative provisions for changes of venue from the courts of the state to those of the United States. The right "of applying to the courts of justice for the redress of injuries," * * * embraces "not only the substantial part or judicial decisions of the law, but also the formal part, or method of proceeding." [1*st Blackstone's Com.* 141–142.]

2nd. *Any abridgment of the privileges of a citizen of the United States is unconstitutional.*

The 1st clause of the second section of the fourth article of the constitution declares, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." On the 21st of July, 1868, this clause was defined, extended and applied by the first section of the 14th article, which provides, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This section in its first clause defines what shall constitute citizenship of the United States, and distinguishes between that citizenship and citizenship of a state, by adding to the latter the qualification of residence within the state.

The second clause prohibits the making or *enforcement* of any law which shall or will abridge the privileges or

immunities of citizens of the United States who may or may not reside within the state. At the time of the adoption of this article, many laws were in existence which abridged the privileges of the colored race, which was included in the definition of a citizen of the United States. These were all repealed by the prohibition against their enforcement. If a state statute had existed which provided that in an action against a white citizen by a colored citizen the statute of limitations should bar his claim at the expiration of 10 years, but in a like action of a white citizen against a white citizen, in twenty years, the constitutional clause would invalidate the partial statute. If the same law had provided that the limitation as to resident citizens of the United States in the state courts should be twenty years, and non-resident citizens in the same courts should be ten years, such provision is forbidden by the 14th amendment to be enforced.

The third clause of the section declares, that the denial by a state to any citizen of the United States within its jurisdiction, of the equal protection of its laws, is an abridgment of the privileges of citizenship of the United States.

3d. *The application of the statute of limitation of the State of Wisconsin contended for by the defendant, and applied by the court below, is an abridgment of the privilege to sue in the courts of the United States.*

The last clause of the first section of the fourteenth article of the constitution as above cited, declares that equal protection of the laws is one of the privileges of a citizen of the United States. In the case of *Paul vs. Virginia, 8th Wallace*, 180, Field, J., declares: "But the privileges and immunities secured to citizens of each state, in the several states, by the provision in question, are those privileges and immunities which are common to the citizens of the latter state, under their constitution and laws by virtue of their being citizens." In *Slaughterhouse Cases, 16th Wallace*, 130, the subject of the meaning of the four-

teenth article was very fully examined and considered, Miller, J., delivering the opinion of the court, declaring: "Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizen, or as you limit or qualify or impose restrictions on their exercise, the same neither more nor less shall be the measure of the rights of citizens of other states, within your jurisdiction." Field, J., dissenting in the same case, declared: "No discrimination can be made by one state against the citizens of other states in their enjoyment, nor can any greater imposition be laid than such as is laid on its own citizens. It is a clause which insures equality in the enjoyment of these rights between citizens of the several states while in the same state." Bradley, J., in the same case, declares: "If a man be denied full equality before the law he is denied one of the essential rights of citizenship as a citizen of the United States." In the same case Swayne, J., declares: "Due process of law is the application of the law as it exists in the fair and regular course of administrative procedure. The 'equal protection of the laws' places all upon a footing of legal equality, and gives the same protectien to all for the preservation of life, liberty, and property, and the pursuit of happiness." The right of property is an absolute right. The bonds of the city of Watertown, when delivered to the plaintiffs' assignor, were property. When assigned to the present plaintiff, they were his property. That right of property accrued within the State of Wisconsin. As the defendants contend, had suit not been brought on them, in the Circuit Court of the United States, being sealed instruments, the statute of limitation would not have barred them for twenty years after maturity; but as suit was brought in the Circuit Court of the United States, and judgment obtained, the bonds and the judgment thereon are barred at the expiration of ten years from the judgment. The plaintiffs had a right to bring suit on the bonds when due. As a penalty for the exercise of that right by bringing suit in the United States court, his property is lost ten years sooner than it would have been had he brought no suit at

all. If he had brought suit in the state court, his right of property would have continued to exist for twenty years after judgment. A premium of a greater durability of right is offered in favor of judgments obtained in the state courts. It may be replied, that the creditor by bringing suit upon the judgment within ten years, might have had the full term allowed in the state court. But to be required to bring two suits in the United States court to obtain the same results as might be obtained by one suit in the state court, is an imposition of double expense and trouble on the suitor, over what is imposed on the citizens of the state in the state court. If the bonds on which this suit is founded had been ewned by a citizen of Wisconsin he would have been compelled to have brought suit in the state court, and the limitation of the judgment for his benefit would have been twenty years. It is one of the privileges and immunities of a citizen of the United States, being a citizen of another state, to sue in the United States courts.

As they were owned by a non-resident citizen of the United States, and the suit was brought in the Circuit Court of the United States, the limitation, the defendant contends and the court below ruled, is but ten years. This inequality of limitation is founded, either on the fact that the plaintiff is a citizen of the United States and of another state than Wisconsin, as distinguished from a citizen of that state, or, because as a citizen of the United States and of another state, he brought suit in the United States court. But under the interpretations given to the fourteenth amendment above quoted, the state can impose neither more nor less limitations, qualifications or restrictions on a citizen of the United States and of another state, than it does on its own citizens. If, therefore, this inequality of limitation is placed upon the ground that the plaintiff is not a citizen of the State of Wisconsin, it cannot be sustained. If placed upon the ground that the inequality of limitation is based upon the facts, that as a citizen of the United States and of another state the plaintiff brought suit in the Federal court, the reply is, that the

right to bring suit in the Federal courts, as has been shown, is a constitutional privilege of a citizen of the United States and of another state, and the fourteenth amendment forbids the states to make or enforce any law which shall abridge that privilege. The fourteenth amendment, we maintain, as intended and interpreted, forbids any discrimination as to rights and remedies by state laws between citizens of a state, and citizens of the United States being also citizens of another state, whether those state laws are intended to discriminate against the courts of the United States, into which a citizen of the United States has a right to go, or directly against the citizen because of his non-residence in the state. Equality of justice, both in form and substance, between all the citizens of the United States, wherever found in the same territorial limits, is assured against adverse, discriminating state laws.

If it be replied that the law abridges the immunities and privileges of its own citizens, guaranteed to them by the constitution, as much as it abridges the immunities and privileges of citizens in other states, the answer is, that it has no right to deny either to its own citizens or those of other states their constitutional rights. The iniquity of doing wrong to all alike does not extenuate the vice of the statute, as construed by the court below.

G. A. Jenks,
of Counsel for Plaintiff in Error.

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153-671

SUPREME COURT OF THE UNITED STATES,

October Term, 1891,

NO. [redacted] 18

ELIAB W. METCALF, Plaintiff in Error,

vs.

THE CITY OF WATERTOWN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

Additional Supplemental Brief of Plaintiff in Error.

G. A. JENKS,
of Counsel for Plaintiff.

JOHN McMURRAY & SONS, PRINTERS, BROOKVILLE, PA.

SUPREME COURT OF THE UNITED STATES,

October Term, 1891,

NO. 412.

ELIAB W. METCALF, Plaintiff in Error,

vs.

THE CITY OF WATERTOWN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

Additional Supplemental Brief of Plaintiff in Error.

Brief of Argument.

Because the question involved in this case is apparently an important one, we ask leave to file this additional brief.

In the supplemental brief filed in this case it was endeavored to be established,

FIRST. That "as the judgment upon which the action was founded was rendered in the State of Wisconsin, the limitation of the right of action by the statute of Wisconsin was twenty years and not ten."

SECOND. That "the construction of the statute of Wisconsin of 1858 contended for by the defendant, and adopted by the Circuit Court, would render the statute unconstitutional and void."

The Supreme Court of Wisconsin has construed the act of 1858, and decided that under that act the limitation of ten years bars judgments of the Circuit Courts of the United States, sitting within the State of Wisconsin.

The Circuit Court of the United States for that district has followed the ruling of the State court, and decided that the act of 1858 bars the action in this case.

That the construction given by the highest court of a State to the statutes of the State is accepted by the courts of the United States as the true construction of the statutes construed need not be denied; for we maintain that it is not a question of constructionof a State statute which is involved, but the question is, first, does such a statute exist; and second, if it exists does it apply to this case?

I.

THE STATE OF WISCONSIN HAD NO POWER TO ENACT A STATUTE OF LIMITATION AS TO JUDGMENTS OF THE COURTS OF THE UNITED STATES, EITHER FOR THE COURTS OF THE UNITED STATES OR HER OWN STATE COURTS.

The enactment of the State of Wisconsin on which this case was ruled, is:

"Section 16. Within ten years.

"1st. An action upon a judgment or decree of any court of record of any State or Territory within the United States, *or of any court of the United States.*"

No state or nation has power to pass a statute of limitation which shall be effective or obligatory outside of the boundaries of its sovereignty.

The boundaries of a nation's sovereignty may be either territorial lines or limits by subjects.

"In American constitutional law there is a division of the powers of sovereignty between the National and State governments by subjects; the former being possessed of supreme, absolute and uncontrollable power over certain subjects throughout all the States and Territories, while the States have the like complete power within their respective territorial limits over *other subjects.*" [*License*

Cases, 5 *Howard*, 588; *Cooley's Constitutional Limitations*, *page* 2.]

"The powers of the general government and of the states, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court as if the line of division was traced by landmarks and monuments visible to the eye." *Ableman vs. Booth*, 21*st Howard*, 516.]

By the 1st section of the 3rd article of the Constitution, "The judicial power of the United States is vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish."

The second section of the same article ordains that "The judicial power shall extend to all cases in law and equity * * * between citizens of different States."

The judicial power thus conferred upon the Federal courts embraces every particular power necessary for its exercise. By virtue of it, the courts of the United States are made a subject exclusively within the control of the sovereignty of the United States.

"The grant of the judicial power to the department created for the purpose of exercising it, must be regarded as an exclusive grant, covering the whole power, subject only to the limitations which the Constitution imposes." [*Cooley's Constitutional Limitations*, 88.]

"In regard to the Constitution of the United States, the rule has been laid down, that where a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one or the performance of the other is also conferred." [*Cooley's Constitutional Limitations*, *page* 63; *Story on the Const.*, *sec.* 430; *United States vs. Fisher*, 2d *Cranch*, 358; *McCollough vs. Maryland*, 4th *Wheaton*, 428.

In the case of Ableman vs. Booth, 21st Howard, 506, Booth had been committed to prison by a United States Commissiener for an alleged crime against the United States. He was discharged on a *habeas corpus* by a Judge of the Supreme Court of Wisconsin, and the discharge was affirmed by the Supreme Court of the State. Booth was afterwards arrested, committed, sentenced and imprisoned for the crime by the United States Court. Another *habeas corpus* was issued, and Booth discharged by the Supreme Court of Wisconsin, which decided that the imprisonment was illegal. The cases were removed to the Supreme Court of the United States. Admitting the power of the State to legislate, and the State courts to grant writs of *habeas corpus*, the substantial question to be decided was, did these admitted rights extend to or embrace the power to trench upon the subjects which by the Constitution of the United States were within the sovereign power of the United States? In response to this inquiry, Taney, C. J., delivering the opinion (page 516) declares: "If the Judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it, even if it had been attempted to do so; for no State can authorize one of its judges or courts to exercise judicial power by *habeas corpus or otherwise* within the jurisdiction of another and independent government."

In the case of Beer vs. Haughton, 9th Peters, 329–359, it is ruled substantially that the laws of the State *vi propria* have no other force and effect in the Federal courts than the laws of a foreign country.

In the case of Rio Grande Railroad Co. vs. Gomila, 132d U. S., 478–481, Field, J., enforces this principle, ruling that "The jurisdiction of a court of the United States *once obtained over property by being brought within its custody*, continues until the purpose of the seizure is accomplished, and cannot be impaired or effected by any legislation of the

State or by any proceedings subsequently commenced in a State court. This exemption of the authority of the courts of the United States from interference by legislative or judicial action of the States is essential to their independence and efficiency. If their jurisdiction could in any particular be invaded and impaired by such State action, it would be difficult to perceive any limit to which the invasion and impairment might not be extended."

The jurisdiction of the United States Court does not terminate with the rendition of the judgment, but adheres till the judgment is satisfied. It continues to be a subject over which the United States has exclusive jurisdiction.

In the case of Wayman vs. Southard, 10th Wheaton, 23, Marshall, C. J., declares: "The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied." Again at page 30, "It has been suggested that the words 'in suits at common law' restrain the preceding words to proceedings between the original writ and judgment. But these words belong to 'writs and executions,' as well as to 'modes of process,' and no more limit the one than the other. As executions can issue only after a judgment the words 'in suits at common law' must apply to proceedings which take place after judgment. But the legal sense of the word suit adheres to the case after the rendition of the judgment, and it has been so decided." Again at page 49, after denying the power of a state legislature to pass a law to directly regulate proceedings in the United States courts, he then proceeds: "No gentleman, we believe, will be so extravagant as to maintain the efficacy of such an act. It seems not much less extravagant to maintain that the practice of the Federal courts and the conduct of their officers can be indirectly regulated by the State legislature by an act proposing to regulate the proceedings of the State courts and the conduct of the officers who execute the process of these courts. It is a general rule that what cannot be done directly from defect of power cannot be done indirectly."

We maintain that the United States, by virtue of its sovereignty, has exclusive jurisdiction over its courts and judgments rendered therein. The United States courts retain their jurisdiction of their judgments until they are satisfied, by virtue of the sovereignty of the United States over the subject. Every citizen of the United States has the constitutional right, by virtue of his citizenship, to sue in any of the State courts. When such suit is brought it is not within the power of a State to increase or diminish the value of the judgment by favorable or unfavorable legislation. Such legislation is an "invasion and impairment" of the exclusive jurisdiction of the United States. If this were conceded to be within the power of the State, the principle would enable a State to reduce the rank of a judgment of a court of the United States to that of a simple contract debt, as indicated in the case of McElmoyle vs. Cohen, 13th Peters, 330, and that too to a simple contract debt without the conclusiveness of a judgment of a State court, the conclusiveness of which is expressly established by the 1st section of the 4th article of the Constitution.

The States may pass statutes of limitations upon the judgments of the courts of other States, because they are "considered only distinguishable from foreign judgments in this, that by the 1st section of the 4th article of the Constitution, and by the act of May 26th, 1790, section 1, such judgments are a record conclusive upon the merits, to which full faith and credit shall be given when authenticated, as the act of Congress has prescribed." [*McElmoyle vs. Cohen*, 13th *Peters*, 324.

But judgments of the Federal courts are in no sense foreign anywhere within the United States. They are not mere *prima facie* evidence of debt. When rendered they are judgments, and so remain everywhere in the United States, existing with full force as such, entirely independently of any State legislation. No State, either in its own courts or in the Federal courts, can diminish their value or their perpetuity.

In the case of Buckner vs. Finley, 2d Peters, 590, Washington, J. declares, "For all National purposes embraced by the Federal Constitution the States and the citizens are one, *united under the same sovereign authority and governed by the same laws.* In all other respects the States are necessarily foreign and independent of each other."

If each and every State in the Union may pass a separate and different statute of limitations as to judgments of the Federal courts, the citizens of the United States "for the purposes embraced in the Constitution" cannot truthfully be said to be "governed by the same laws." We therefore maintain that the clause "or of any court of the United States" in the first paragraph of the 16th section of the Limitaitons Act of 1858 of the State of Wisconsin should be stricken out, because it is inconsistent with the Constitution of the United States, and its passage assumes a power forbidden to the States.

II.

IF THE LAST CLAUSE OF THE 1ST PARAGRAPH OF SECTION 16 OF THE STATUTE OF LIMITATIONS OF 1858 OF THE STATE OF WISCONSIN IS VALID AS LAW, THAT SECTION DOES NOT APPLY TO THIS CASE, BUT THE 1ST PARAGRAPH OF SECTION 15 APPLIES.

It is not dependent upon the intent of the legislature of of Wisconsin which passed the act of 1858, nor upon the interpretation that the courts of that State have given to that statute, to determine which section applies to this case. For the statute has no conclusive efficacy in the Federal courts by reason of its enactment by the State. If the statute has any applicability in the Federal court, it is because of the Federal enactment of section 721 R. S., which provides: "The laws of the several States, except when the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as the rules of decision in trials at common law in the courts of the United States *where they apply.*"

The real question to be decided in this case, if the statute is valid, is, which of the two sections, 15 or 16, apply to the facts of this case? This must be determined by an interpretation and application of the United States statute above quoted.

Section 15 of the state statute is:

"Within twenty years.

"1st. An action upon a judgment or decree of any court of record of this State."

Section 16 is:

"Within ten years.

"1st. An action upon a judgment or decree of any court of record of any State or Territory within the United States, or of any court of the United States."

The first is the general rule of limitations applicable to judgments of the State courts which are located in the State. The second provides for occasional and exceptional cases in the State courts, and to such courts as sit outside of the State. The first as to parties, is the sole rule in suits between citizens of the State. The second is a special rule which applies only to causes of action originally owned by citizens of different States or foreigners, or to causes to which citizens of different States, or to which a foreigner is a party.

Which of the two sections apply to this case must be determined by inquiring what was the intent of Congress in enacting section 721 R. S. That section, we maintain, was intended to establish in each State a uniformity of rules of decisions between the courts of the United States and those of the state in which the Federal court was sitting. It was intended to conform the rules of decision of the Federal courts to the same principles and laws for the security of persons and property which were established for the protection and enforcement of the rights of the citizens of the State. It was in harmony with the 2d section of the 4th article of the Constitution, which provides:

"The citizens of each State shall be entitled to all privileges and immunites of citizens in the several States." It was also a recognition of the justice of the inhibition of the 14th Amendment to the Constitution, by which a State is forbidden to "deny to any person within its jurisdiction the equal protection of the laws."

When Congress passed the act under consideration it was not contemplated that the States either could or would pass laws for the Federal courts, either as to the force or duration of their judgments, nor with reference to the process by which they should be enforced; for if that had been contemplated neither the rule of decisions nor the precedure acts would have been passed. It was assumed that the States would only pass laws for their own courts and for their own citizens, and it was thought necessary to apply such acts to all citizens of the United States and to foreigners by National enactment.

We therefore contend that the true interpretation of section 721 R. S., according to the intent of the lawmakers, is that, "the laws of the several States where they apply" means such of the general laws of the States as are made for the courts and the resident citizens of the State, and does not mean such special and exceptional laws as may be passed for non-resident citizens or foreigners. The words "where they apply" means the territorial limits of the State, and that the Federal courts within those limits shall apply the same laws to citizens of the United States and to foreigners as the State courts under general laws apply to litigation between the citizens of the State. As then the judgment on which this suit is brought was rendered by a Federal court within the State of Wisconsin, the general law which would apply between two citizens of Wisconsin in the State court applies to this case. That law is the 15th and not the 16th section of the limitations act, and is twenty years and not ten.

G. A. JENKS,
of Counsel for Plaintiff in Error.

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Supreme Court of the United States

October Term, 1892.

No. 84.

ELIAB W. METCALF,

Plaintiff in Error,

vs.

THE CITY OF WATERTOWN,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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Supreme Court of the United States

October Term, 1892.

No. 84.

ELIAB W. METCALF,

Plaintiff in Error,

vs.

THE CITY OF WATERTOWN,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

This action is upon a judgment of the Circuit Court of the United States for the District of Wisconsin, recovered May 8th, 1866. It was commenced in June, 1883, more than seventeen years after the cause of action accrued. The defense is, that it is barred by the Wisconsin statute prescribing a limitation of ten years for actions upon judgments of Federal courts and certain other courts of record. It is so barred if that statute fixes the limitation for commencing it and is valid. Hence, the only questions presented are, first, does that statute prescribe such limitation, and, second, is it valid.

I.

The Wisconsin statute, sub-division one, section 16, chapter 138, R. S. 1858, prescribing a limitation of ten years for actions upon judgments of Federal courts and certain other courts of record, prescribes the limitation for commencing this action.

1. The cause of action having accrued prior to November 1st, 1878, the limitations prescribed by chapter 138, R. S. 1858, apply to and control the action, notwithstanding the subsequent revision.

(a) The revision of 1878 continues in force the limitations prescribed by said chapter 138 as to all actions accruing before November 1st, 1878. This is done by section 4984, R. S., 1878, which is as follows:

"Section 4984. In any case when a limitation or period of time prescribed in any act which is hereby repealed, for the acquiring of any right or the barring of any remedy, or for any other purpose, shall have begun to run, and a limitation or period of time for such purpose shall be prescribed in these revised statutes, the limitation or period prescribed by these statutes shall be held to apply only to such rights or remedies as shall accrue subsequently to the time when the same shall take effect; and the act repealed shall be held to continue in force and operative to determine all such limitations and periods of time which shall have previously begun to run, unless, in special cases in these revised statutes, a different rule shall be prescribed."

Chapter 138, R. S. 1858 was repealed by the revision of 1878 which took effect November 1 of that year (sec. 4978, R. S.) Hence, that chapter continues in force and operative to determine the limitations for the commencement of all actions that accrued before November 1st, 1878, while the revised statutes of 1878 control such actions only as accrued after that date.

Mead et. al., vs. Nelson, 52 Wis., 402.

Kaehler vs. Doöberpuhl, et. al., 56 Wis., 480.

Whitcomb vs. Keator, 59 Wis., 609.

We must therefore look to chapter 138 of the revision of 1858 to ascertain the limitation controlling this action. The sections of this chapter affecting the question are sections 1, 14, 15 and 16 which are as follows:

"Section 1. Civil actions can only be commenced within the periods prescribed in this chapter, except when in special cases a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited, can only be taken by answer.

"Section 14. The periods prescribed in section one of this chapter for the commencement of actions other than for the recovery of real property, shall be as follows:

Section 15. Within twenty years;

1. An action upon a judgment or decree of any court of record of this state.

2. An action upon a sealed instrument, when the cause of action accrues within this state.

Section 16. Within ten years;

1. An action upon a judgment or decree of any court of record of any state or territory within the United States, or of any court of the United States.

2. An action upon a sealed instrument when the cause of action accrued without this state."

Other statutory provisions affecting the question are section 1, chapter 282, general laws of 1861, which reads:

"Whenever in chapter one hundred and thirty-eight of the revised statutes, a time is prescribed within which actions must be commenced, such time shall be computed to commence at or from the time the several causes of action named in said chapter shall have accrued."

Also sections 4219, 4220 and 4221 of the revised statutes of 1878, which are as follows:

"Section 4219. The following actions must be commenced within the periods respectfully hereinafter prescribed after the cause of action has accrued.

Section 4220. Within twenty years;

1. An action upon a judgment or decree of any court of record of this state, or of the United States, sitting within this state.

2. An action upon a sealed instrument when the cause of action accrues within this state, except those mentioned in section four thousand two hundred and twenty-two.

Section 4221. Within ten years;

1. An action upon a judgment or decree of any court of record of any other state or territory of the United States, or of any court of the United States, sitting without this state.

2. An action upon a sealed instrument, when the cause of action accrued without this state, except those mentioned in the next section."

Sub-divisions 3 and 4 do not bear upon the question and are therefore omitted.

(b.) Even if the revision of 1878 had not so continued the limitations of the earlier revision, the latter would still control this action, as the ten years limited by section 16, chapter 138, R. S., 1858, expired while that statute was still in force, and the right to bring the suit became thereby barred, and no subsequent statute could renew it.

Sprecher et. al., vs. Wakeley, et. al. 11 Wis., 432.
Hill vs. Kricke, 11 Wis., 442.
Knox vs. Cleveland, 13 Wis., 245.
Parish et. al., vs. Eager, 15 Wis., 532.
Smith vs. Cleveland, et. al., 17 Wis., 556.
Pleasants et. al., vs. Rohrer, 17 Wis., 577.
McKinney vs. Springer, 8 Blackf., 506.
Stopp et. al., vs. Brown, 2 Carter, 647.
Wires & Peck vs. Farr, 25 Vt., 41.
Davis vs. Minor et. ux., 1 How. (Miss.), 183.

Mr. Angel is his work on Limitations page 17, Sixth edition, note, cites many other cases to the proposition that, "A statute extending the time of limitation will not revive causes of action already barred upon pre-existing statutes."

It being then settled that the limitation for this action must be found in chapter 138, R. S., 1858, the simple question is, which clause of that statute is it to be found in; sub-division 1, of section 15, prescribing twenty years, or sub-division 1 of section

16, fixing ten. The plaintiff in error contends, in the former and the defendant in error claims, in the latter.

2. The period of ten years prescribed by sub-division 1 of section 16, not that of twenty years specified in sub-division 1 of section 15, is to control here.

In the revision of 1858, actions upon judgments of courts of record are classfied as respects the courts by which the judgments were rendered, not as to the territory within which they were rendered. Actions upon judgments of all such courts of Wisconsin are placed in one class, and those upon judgments of like courts of the other states and territories, and of the United States, are placed in another. To the former class was assigned a limitation of twenty years by section fifteen; and to the latter a limitation of ten years by section sixteen. The basis of classification here, it is plain, is the courts rendering the judgments, not the locality or territory within which they were rendered. But actions upon sealed instruments are classified as respects the territory within which the cause of action accrued. All such actions accruing within the state comprise one class, while all accruing without comprise another. The fact that there is this marked difference in the basis of classification expressed in unmistakable language within the limits of a few lines emphasizes the construction we contend should be adopted. In the revision of 1878, the territory within which the cause of action accrued is made the basis of classification of actions upon judgments as well as actions upon sealed instruments. All actions upon judgments rendered within this state, whether by a state or United States court were assigned to one class, while those rendered without the state were assigned to another.

It is plain, therefore, that the controlling consideration actuating the legislature in adopting sections 15 and 16, so far as actions upon judgments were concerned, was, not the locality where the cause of action might arise, but the court by which

the judgment was rendered; and if anything can be made clear by appropriate language, that used in these two sections renders this conclusion irresistible.

Sub-division 1 of section 15, prescribes the limitation for judgments of all courts of record of this state. It disposes completely of the judgements of all such courts, and leaves undisposed of only the judgments of courts of record of other states and territories within the United States and of the United States. Section 16 then takes up and disposes of the matter which section 15 thus left undisposed of. No exception such as "other than courts sitting within this state", is expressed, because none was intended, and because, also, if it had been, no limitation would have been provided for the judgments of United States courts sitting within the state.

The course of legislation in Wisconsin on this subject confirms this construction. From 1839 down to the revision of 1858, the limitation for actions upon judgments of all courts of record, whether of the United States, or any state or territory of the United States, was the same, twenty years; and it was expressed in apt and appropriate language in section 36 of "An act concerning the time of commencing actions," statutes of Wisconsin territory, page 263; and section 41, chapter 127, revised statutes of 1849, both of which are as follows:

"Every judgment and decree in any court of record of the United States or of any state or territory of the United States, shall be presumed to be paid and satisfied at the expiration of twenty years after the judgment or decree was rendered."

There can be no two opinions respecting this section. The legislature had its attention directed to judgments of both Federal and state courts, and purposely prescribed a like limitation for all.

This legislation remained for nearly twenty years. Then came the radical change in the revision of 1858. Why

this remarkable change of language, if no change of meaning was intended? It can be explained only on the theory that a distinction was to be made between judgments rendered by courts of record of this state, and those rendered by courts of record of other states and territories and of the United States. And here again the legislature used apt and appropriate language to express that intent. A limitation of twenty years was prescribed for judgments of courts of record of that state while a limitation of only ten years was fixed for judgments of like courts of other states and territories and of the United States. Thus stood the statute for another twenty years. Then came the modification contained in sections 4220 and 4221, revised statutes of 1878, whereby the twenty years limitation was extended to judgments of courts of record "of the United States sitting within this state," and the ten years limitation was confined to judgments of courts of record of any other state or territory "or of the United States sitting without this state."

Thus from 1839 to 1858 a limitation of twenty years prevailed on judgments of all courts of record, whether of that state or of any other state or territory, or of the United States. Then, in 1858, the twenty years limitation was confined solely to judgments of courts of record of that state and a ten years limitation was prescribed for the judgments of courts of record of the other states and territories and of the United States. Then, after twenty years, by the revision of 1878, there was a partial return to the law as it was before 1858. The twenty years limitation was extended to judgment of courts of record of the United States sitting within that state, and the ten years limitation restricted as above. And the revisors giving their reasons for this change say: "Judgments of United States courts in this state, *are put on the same footing*, as domestic judgments, as manifestly proper." Revisors' Notes, page 289, section 4220.

So that the legislation on the subject gives additional force to the construction we assert. It shows not merely an alteration

in phraseology or the omission or addition of words only, but such a radical change, not only in the language, but the structure of the statute, as to evidence a clear intent on the part of the legislature to change the statute and its construction within the rule as to the revision of statutes referred to by plaintiff in error.

For the same reason no aid is gained by resort to the statutes of other states making no distinction between judgments of their own courts and of the courts of other states and of the United States. Here, the distinction is plainly made and intended, and it is therefore useless to consult the legislation of other states collected in the different work on limitations.

The history of sections 15 and 16 and the manner of their preparation, presentation and adoption, is conclusive of their construction, and that the interpretation adopted by the circuit court is the correct one and should prevail. To this important consideration we now invite attention.

The revised statutes of 1858 of Wisconsin are something more than a mere revision of the former statutes. The law authorizing their preparation, chapter 126, General Laws of 1856, of that state, required the revisors not only to "collect, compile and digest the general laws of the state" and "report such compilation to the legislature," but also to "accompany their report with such proposed amendments as they may think proper to suggest." Under this authority, the revisors prepared not only a revision or compilation of the former statutes but also several amendments to those statutes as thus revised and compiled. See Revisors' Report, page 256, volume 1, Senate Journal, 1858 of Wisconsin. In this report they state, first, that they have made a compilation of the former statutes making only such verbal changes as would express more clearly their meaning. Then, after thus disposing of the compilation or revision proper, they say:

"The undersigned also herewith submit several amendments which they have prepared *some of which change the present statutes;* others are intended to explain and perfect the laws already in existence, and others are intended to provide for cases not now provided for; none, however, of the amendments or *new enactments* submitted herewith are intended to make any *radical* change in the *system of laws*, contained in the revised statutes, and the subsequent enactments of our different legislatures.

The manner of doing this work, as appears by the original files in the office of the secretary of state, was as follows: They first compiled all the existing statutes under proper titles, divided into appropriate chapters, making no changes except verbal ones to express the meaning more clearly. These chapters thus compiled were prepared so as to be adopted as reported by the revisors, if the legislature desired to make no change in the meaning of the existing statutes. Then, with such of these compiled chapters as the revisors thought ought to be changed in meaning and substance, they reported new chapters covering the same subjects and embracing the changes recommended by them. These new chapters were styled amendments of, or substitutes for, the compiled chapters. So that if the legislature desired to make the changes suggested by the revisors, they could adopt the new chapters as amendments to, or substitutes for, the compiled chapters.

Just what was done respecting the limitation of actions is as follows: First, the revisors compiled all the existing statutes on that subject into one chapter known as chapter 135 of the compiled statutes. It embraced simply the provisions of the revision of 1849, on that subject, with such amendments as had since been made by the legislature, with a few verbal changes to express the meaning more accurately. With this compiled chapter, they reported a new chapter on the same subject embracing such substantial changes as they thought ought to be made. It was entitled "Substitute for Chapter 135 of Compiled Statutes —— Of the Limitations of Actions", and was endorsed

"Amendment number twenty." This amendment number twenty was adopted by the legislature as a "substitute for chapter 135 of the compiled statutes", as recommended by the revisors, and now appears as chapter 138, R. S. 1858. This all appears by the original files of title 23, of the revised statutes of 1858, in the office of the secretary of state.

Now, one of the principle changes of the old statutes occasioned by this amendment or substitute, is the very distinction between judgments of courts of record of this state, and judgments of courts of record of the other states and territories, and of the United States, affected by sections 15 and 16 of chapter 138, R. S., 1858. Can there be any doubt, then, from the history of these sections that the legislature intended to make the change affecting this distinction and that it actually did it by the use of apt and appropriate language.

3. Plaintiff's contention that sub-division 1 of section 15 of said chapter 138, R. S. 1858, instead of sub-division 1 of section 16 prescribes the limitation for this action, is untenable.

It necessitates construing the former sub-division, which reads: "An action upon a judgment or decree of any court of record of this state" to mean actions upon judgments or decrees not only of courts of record of "this state," but of courts of the United States, sitting within this state; and the latter sub-division which reads, "An action upon a judgment or decree of any court of record of any state or territory within the United States, or of any court of the United States," to mean actions upon judgments or decrees of any such state or territorial courts, or of any court of the United States sitting without this state. This is a strained construction and forbidden by well established rules.

(a) Statutes of limitations are now regarded favorably, and, like other statutes, are to be construed agreeably to the ordinary rules of statutory construction.

This court has frequently announced this doctrine. It is said, in *McCluny vs. Silliman*, 3 Pet., 270, "Of late years the courts in England and in this country have considered statutes of limitations more favorably than formerly. They rest upon sound policy and tend to the peace and welfare of society. The courts do not now unless compelled by the force of former decisions, give a strained construction to evade the effect of those statutes. By requiring those who complain of injuries to seek redress by action at law within a reasonable time a salutary vigilance is imposed and an end is put to litigation;" in *Lewis et al. vs. Marshall et al.*, 5, Pet., 470, "Statutes of limitations have been emphatically and justly denominated statutes of repose. The best interests of society require that causes of action should not be deferred an unreasonable time;" in *Clementson vs. Williams*, 8, Cranch, 72, "The statute of limitations is entitled to the same respect with other statutes and ought not be explained away;" in *Leffingwell vs. Warren*, 2 Black, 599, "Statutes of limitation are now regarded favorably in all courts of justice. They are statutes of repose. Usually they are founded in a wise and salutary policy and promote the ends of justice;" in *United States vs. Wilder*, 13, Wallace, 254, "This court has not adopted the rule of decision made at one time in England, (citing cases), and to some extent in this country, under which, by a constructive equity, judicial refinement came near to abolish the statute altogether. On the contrary, following the decisions of the English courts, (citing them) made more immediately after the passage of the statute of James I., we have sought to give it full effect. In 1814 Marshall, Chief Justice, delivering the judgment of this court, declared that the statute of limitations was entitled to the same respect as other statutes and should not be explained away. The same doctrine has been asserted in subsequent decisions."

(b) Plaintiff's construction is forbidden by the familiar rules that words are to be interpreted according to their ordinary and usual meaning and that the legislative intent is to control.

Two distinct and well defined classes of courts exist in this country; the one, courts of the state, and the other, courts of the United States. This classification is natural, necessary, accurate and universally recognized. Not only do these courts constitute two separate and distinct classes, but their separate and distinct existence is always and everywhere acknowledged. The phrases, "courts of the state," and "courts of the United States," have, in this connection acquired a clear, fixed and well understood meaning. Unmistakably that meaning, everywhere received and acted upon, is, that the former embraces such courts only as have been established by the state, and the latter such only as have been created by the United States. This has been the uniformly received significance of these words, among all classes of people, ever since the foundation of the government. Two expressions, with a more firmly fixed, unvarying and universally understood meaning here, could hardly be found in the English language.

As stated in *Pennoyer vs. Neff*, 95 U. S., 714; "Whilst they, (courts of the United States) are not foreign tribunals in their relations to the State Courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction." Although both Federal and state courts exist and exercise their functions within the same territorial limits, yet as stated in *Abelman vs. Booth*, 21 How., 506, they are the courts of "separate and distinct sovereignities, acting separately and independently of each other, within their respective spheres."

Now, when the phrases, "courts of the state" and "courts of the United States" are used in the statute, and especially as distinguished from each other, how are they to be interpreted? It would seem there could be no difference of opinion. They must be interpreted according to their known, ordinary and usual significance.

Maillard, et al vs. Lawrence, 16, How., 251.

Levy's Lessee, et al, vs. McCartee, 6, Pet., 102.

Sturges, vs. Crowninshield, 4, Wheat., 122.
Ogden vs. Saunders, 12, Wheat., 213.
United States vs. Fisher, 2, Cranch, 358.

The Supreme Court of Wisconsin has often asserted and applied the same rule.

Ogden vs Glidden et al, 9 Wis., 46.
Blunt vs. Walker, et al, 11, Wis., 334.
Brightman vs. Kiner, 22, Wis., 53.
Battis, et al, vs. Hamlin, 22, Wis., 637.

In the light of the foregoing rules, plaintiff's construction, we submit, ought not to be adopted. The language of section 15, "An action upon a judgment or decree *of any court of record of this state*," itself excludes judgments of all courts of the United State. It speaks of judgments and decrees of court "of this state", only. A court of the United States is not a court "of this state", in the sense the words are there used. The former is just as separate and distinct from the latter as is the court of any other state or territory. The courts of record "of this state" (Wisconsin), are the courts established by the constitution and laws of that state; while those of the United States are the several courts created by the constitution and laws of the United States. It is the former only that are embraced in the expression "any court of record of this state" as it appears in section fifteen.

Equally forced and strained is it to say that the expression "any court of the United States" in section 16 means such courts of the United States only as sit without the state. "*Any court* of the United States" includes all courts of the United States, those sitting within, equally with those sitting without the state, and it is a plain perversion of the language to say that the clause "any court of the United States" does not include courts of the United States within that state.

The fallacy of the argument of plaintiff in error is well illustrated by the conclusion it forced him to. In order to apply the twenty years limitation to this action, he contended in his brief in the court below, that the clause "any court of the United States," as found in section 16, does not embrace the Circuit Court of the United States for the District of Wisconsin, but only "courts of the United States which are not courts of any state or territory, as the Supreme Court, the Court of Claims, and the Circuit Court of the District of Columbia." Such is the conclusion reached by plaintiff in error and to which he invites this court, and which it must accept if it adopts his construction.

The second sub-divisions of these sections strengthen, rather than weaken, our construction. There the legislature marks, *ex industria*, the distinction between actions accruing "without the state," and those accruing "within the state," and expresses it by apt words. If with this distinction thus before them, the legislature had intended to limit the meaning of "any court of the United States," as used in sec. 16, to such courts only as are "without this state," it is fair to presume they would have used those limiting words in that connection, as they did in the next sub-division where they wished such limitation to prevail. So too, if they intended to embrace in "any court of record of this state," as used in section 15, all courts, both Federal and state, "within this state," is it not reasonable to say, that they would have used the latter qualifying phrase there as well as in the second sub-division. What necessity or even propriety in the change of expression if no change of meaning was intended?

In these sections 15 and 16, the distinction between courts of this state and courts of other states and territories, and of the United States is expressly taken. The two classes of courts were in the mind of the legislator at the time, and he used appropriate language to mark this distinction and describe the

two classes. Section 15 takes up one class, courts of this state, and disposes of them. Then section 16 takes up the other class, courts of other states and territories and of the United States, and disposes of them. Now, to say, that, after all this, any of the latter class are included in the description of the former, is doing violence to the language used, actually thwarting the intent of the legislature plainly expressed.

(c.) The cases cited by plaintiff in error are therefore not authorities controlling the construction of this statute. In neither of them was a statute being construed that assumed to mark the distinction between state courts and United States courts, and with qualifying clauses as above in some of its sub-divisions and not in others. There, either a statute confessedly making no such distinction was under review, or the question was whether the judgments of the United States courts were to be considered foreign judgments in the state courts within the meaning of the rule that the merits of foreign judgments are inquirable into.

In *Claflin vs. Houseman*, 93, U. S., 130 the question was whether an assignee in bankruptcy appointed under the National Bankrupt Act could sue in a state court; and it was held he could, because the act of Congress did not make the jurisdiction of the United States courts exclusive in such cases, as it might have done.

In *Turnbull vs. Payson*, 95, U. S. 418, and *Mewster vs. Spaulding*, 6, McLean, 24, the question was whether judgments of United States courts must be authenticated as foreign judgments or as domestic. That it was not held or intended to be held that Federal courts were courts of the state in the sense claimed by plaintiff, is made clear by the statement of the court on page 424 of the former case, "That the district court of the United States, *even out of the state composing the district*, is to be regarded as a domestic and not a foreign court."

In *Barney vs. Patterson's Lessees*, 6, H. & J. (Md.), 182, the question was whether a judgment of a United States Court was to be regarded in the state court as a foreign judgment within the meaning of the rule, that foreign judgments are not conclusive upon the parties, but their merits may be inquired into; and the court held that "under the peculiar structure of our political system, it should not be treated as a foreign judgment," but as a domestic judgment, conclusive on the parties.

Ex parte Shollenberger, 96, U. S., 369, went upon the ground that it was manifest from the statute itself, that there was no intention to mark a distinction between federal and state courts; and as the object of the legislature there, as the court said, was to relieve the citizens of the state from the necessity of going outside of the state to seek judicial redress upon contracts with foreign insurance companies, it left the party to commence his action in either the Federal or state court having jurisdiction, as he might see fit. Had, however, the statute there under review, drawn the distinction, as it does here, between the Federal and state courts, we apprehend a different decision would have resulted.

The case of *Simon et. al., vs. Mann, et. al.*, 33 Minn., 412, is clearly distinguishable from this. The question there was whether a garnishment issued by the Circuit Court of the United States for the district of Minnesota was such a garnishment as authorized the debtor to make an assignment for the benefit of creditors, under the insolvent law of Minnesota, the first section of which is as follows:

"Whenever the property of any debtor is attached or levied upon by any officer, by virtue of any writ or process, issued out of a court of record of this state, in favor of any creditor, or garnishment made against any debtor, such debtor may make * * an assignment of all his property for the equal benefit of all his creditors. * * Such assignment shall be made in accordance with and be governed by the laws of the state of Minnesota, relating to assignments made by debtors, except as herein provided."

The court held: "In view of the scope and practice of this insolvent law, we think the Circuit Court of the United States in and for the district of Minnesota is a court of this state within the meaning of the act referred to." Thus it was because of the peculiar scope of that insolvent law and the practice under it, that the court was induced to hold that the United States court for that district was embraced within the expression "a court of record of this state", as used in that particular act. But it did not hold the United States court to be a court of the state within the meaning of a statute, which itself declared the distinction between the two courts.

(d.) It is a well settled principle, in the construction of statutes of limitation, that their language cannot be enlarged or restrained by arbitrary addition or retrenchment, — that the court can not extend their plain words, so as to include cases not within their evident meaning, nor restrict those words so as to exclude cases evidently intended to be included. "To do so would be to usurp the function of another and distinct department of government. It would be legislation and not adjudication", as stated by the court in *Leffingwell vs. Warren*, 2, Black., 599.

Angell on Lim., Sections, 194, 476, 485.
Wood on Lim., Sections, 252, p. 495.
McIver vs. Ragan, et al, 2, Wheat., 29.
Bank of Alabama vs. Dalton, 9, How, 522.
Bowman, et al, vs. Walthen, et al, 1, How., 189.
Kendall vs. United States, 107, U. S., 123.
Amy vs. City of Watertown, 130, U. S., 320.
Knowlton vs. City of Watertown, 130, U. S., 327.

To construe the statute as plaintiff in error contends it should be, would violate this principle. The court would thereby amend the first sub-division of section 15, so as to read, "An action upon a jndgment or decree of any court of record of this state," *or of the United States sitting within this state*, thus add-

ing a very material provision to this sub-division which the legislature did not see fit to adopt. The court would likewise thereby amend the first sub-division of section 16 so as to read, "An action upon a judgment or decree of any court of record of any state or territory within the United States, or of any court of the United States," *sitting without this state.* Here again a very important provision would be incorporated into the statute by the court which the legislature did not see fit to insert. Such a violent change of the statute can not be made by the court. "It would be legislation and not adjudication."

Hanson et. el., vs. Taylor, 23 Wis., 547.
Harrington vs. Smith, 28 Wis., 43.
Lindsay et. al., vs. Fay, 28 Wis., 177.
Encking vs. Simmons, 28 Wis.,272.
Fallass, Adm'r, vs. Pierce et. al., 30 Wis., 443.
Landon vs. Burke et. al., 33 Wis., 452.

In the revision of 1878, the above italicized clauses were added to these sub-divisions respectfully. If they meant the same thing before the addition, what necessity was there for the latter? The very fact that the change was made indicates that the legislature deemed it necessary in order to accomplish the objects of those sub-divisions as they now appear in the last revision.

(e.) Again this statute is so unambiguous as to afford no occasion for judicial construction. It is only when the legislative language is fairly capable of two or more interpretations that construction has any office to perform.

It was said in *Poor vs. Considine*, 6, Wall., 458, respecting a clause the court was asked to construe; "The language of this clause is plain and unambiguous. There is nothing in the context, rightly considered, which qualifies or affects it. There is, we think, no room for construction * *. Were we to adopt the construction claimed by the plaintiff's counsel, instead of adjudicating, we should legislate. That we have no power to

do. Our function is to execute the law, not to make it;" in *United States vs. Graham*, 110, U. S., 219, it is said: "But with the language clear and precise and with its meaning evident, there is no room for construction and, consequently, no need of anything to give it aid. The cases to this effect are numerous." In *Thornly vs. United States*, 113, U. S., 310, "Where the meaning of the statute is plain, it is the duty of the court to enforce it, according to its obvious terms. In such a case there is no necessity for construction."

Edwards vs. Darby, 12, Wheat., 206.
United States vs. Temple, 105, U. S., 97.
Swift Co. vs. United States, 105, U. S., 695.
Ruggles vs. Illinois, 108, U. S., 526.

The Supreme Court of Wisconsin, announcing the same doctrine, in *Mundt vs. Sheboygan & Fond du Lac R'd Co.*, 31, Wis., 452, says on page 457:

"Courts can not correct supposed errors, omissions or defects in legislation. The office of interpretation is to bring out the sense where the words used are in some manner doubtful, and where these are plain and unambiguous, the court can not depart from the language of the statute. This court has too often of late had occasion to repeat and enforce these rules to permit them now to be called in question or disregarded. It is only where the intention of the legislature is ambiguously expressed, so as to be fairly capable of two or more meanings, that interpretation or any latitude of construction is allowable. It is only in such cases that the courts are at liberty to accept or act upon what is termed the doctrine of equitable construction."

The legislative expressions in the statute under inquiry, are clear, unambiguous and incapable of more than one meaning. There is, therefore, no occasion for judicial construction in applying the statute.

4. Plaintiff's construction receives no aid nor countenance from chapter 14, laws of 1866, and chapter 11, laws of 1868 of Wisconsin relating to issuing executions.

Plaintiff in error contends that the effect of those statutes is to modify or repeal the limitation statutes, or, that they must be construed at least as a legislative declaration that judgments of federal and state courts, as said in his former brief, "were intended to be put upon the same footing as respects the time during which they might be enforced, whether by execution or action." This contention, we submit, is untenable as slight consideration will demonstrate.

The object, effect and intent of those chapters can best be ascertained by considering the state of the Wisconsin law on the subject at the time they were passed. The revised statutes of 1858 contain corresponding provisions, and their object was to fix, first, the time within which an execution on a judgment of a court of record of the state, might issue as of course, and second, what action or proceeding must be taken upon such judgment to procure the issuance of an execution after that period. This was done by sections 1 and 2 of chapter 134 of the revised statutes of 1858 which are as follows:

Section 1. The party in whose favor judgment has been heretofore, or shall hereafter be given, may at any time within two years after the entry of judgment, proceed to enforce the same, as provided by this title.

Section 2. After the lapse of two years from the entry of judgment an execution can be issued only by leave of court, upon motion, with personal notice to the adverse party, unless he be absent or non-resident, or can not be found to make such service, in which case, such service may be made by publication or in such other manner as the court shall direct. Such leave shall not be given unless it be established by the oath of the party, or other satisfactory proof, that the judgment or some part thereof remains unsatisfied and due. When the judgment shall have been rendered in a court of Justice of the Peace, and docketed in the office of the clerk of the circuit court, the application for leave to issue execution must be to the court where judgment is docketed.

By these provisions of the revision of 1858, the time within which an execution could issue, as of course, was fixed at two years, and the action or proceeding upon the judgment to obtain

execution after that time was required to be a motion to the court, upon personal notice to the adverse party, or service thereof by publication if absent or non-resident and satisfactory proof that the judgment or some part thereof was still due.

It will be observed also, that while the revision of 1858, fixed the time within which execution could be issued, as of course, to two years, and provided what action or proceeding should be taken to procure execution after the two years, it did not limit the time within which execution could be issued on motion, after the two years.

Such, then, was the state of the laws of Wisconsin when chapter 14 of the laws of 1866 was passed. The practice under the statute up to that time, had demonstrated that the period of two years for issuing executions, as of course, was too short, and that it ought to be enlarged to five years; and also that the power to order execution after the five years should be conferred upon a judge of the court, or a county judge, or court commissioner, instead of being confined solely to the court. So chapter 14 of the laws of 1866 was enacted simply to accomplish those purposes. It is entitled "An Act to provide for issuing executions upon judgments, in certain cases," and its first section is as follows:

"Upon any judgment which has heretofore been, or may hereafter be rendered or docketed in any court of record in this state, execution may be issued at any time within five years after the rendition or docketing thereof, and alias executions may be issued thereon at any time thereafter. But in cases where no execution has been issued within said five years, execution shall only be issued upon leave granted by the court, or a judge thereof, or a county judge, or court commissioner; and such leave shall not be granted by any such court or officer unless it appear to his satisfaction by the affidavit of the party, his agent or attorney, that the judgment or some part thereof remains unsatisfied and due."

By section 2 so much of any law of the state as conflicts with that act was repealed, and by section 3, the act was to take effect from and after its passage. Now what was accomplished

by that chapter? It simply enlarged the time within which execution could be issued as of course, from two to five years, and provided that alias executions might issue at any time thereafter and empowered the judge as well as the court and also a county judge and court commissioner to grant leave to issue executions after five years if no execution had been issued within that time. How did this effect the previous law? Only in that it enlarged the period for issuing executions as of course from two to five years, allowed alias executions to issue at any time thereafter, as under the former statute, and provided substantially like action or proceedings to procure execution after the five years if no execution had been issued within that time, and empowered the judge of the court, and also a county judge or court commissioner to issue alias executions, when before that power was vested only in the court.

So stood the statutes up to 1868. In the mean time it had been noticed that under the statutes as they were from 1858 to 1868 alias executions could be issued at any time, even after the lapse of twenty years, upon taking the prescribed action or proceedings. So, to prevent that, chapter 11, laws of 1868 was passed, adding to said chapter 14 the following: "Provided, that no execution shall issue, nor any action or proceedings be had upon any such judgment, after twenty years from the time of the rendition or docketing thereof."

And, now, how stood the law? Why the time for issuing executions as of course remained five years, the action or proceeding to obtain it after that time continued the same, but the execution could not issue, nor the action or proceeding to obtain it be taken after the lapse of twenty years.

We are now prepared to consider these statutes in relation to executions in connection with the statutes of limitation and to determine what effect, if any, they had on the latter.

The revision of 1858 contained both this chapter 134 relat-

ing to executions and chapter 138 of limitations of actions. Evidently the former was not intended to control or affect the latter. The one provided the time for isuing executions on judgments rendered; the other, the time within which actions must be brought to obtain judgments. The former might be longer or shorter than the latter as the legislature saw fit.

But this is certain if the effect of the acts of 1866 and 1868 was to extend the limitations on judgments of United States courts from ten to twenty years, then a like effect was accomplished by chapter 134, revised statutes of 1858, for in the latter there was no limitation upon the issuance of execution by leave of the court. Again, if those acts had shortened the time within which executions could issue to five years, would that have decreased the period of limitation under the other statute to five years? Evidently, it would not, thus demonstrating that the time fixed for issuing executions upon judgments can not affect the time prescribed for bringing actions upon judgments.

It may therefore be considered as established that sub-division 1 of section 16 and not sub-division 1 of section 15 of the revised statutes of 1858 applies to and controls this action if valid. So the latter is the important question and to that we now address discussion.

II.

Sub-division 1 of section 16, Revised Statutes of 1858 of Wisconsin is a valid statute.

1. The statute prescribes limitations for actions in the state courts only. It does not assume to establish limitations for actions in Federal courts, and does not therefore in any manner

interfere with or impede actions or proceedings in the latter courts. It does not, *proprio vigore*, even apply to them. Were there not an act of Congress applying the statute to those courts, we should not contend for a moment that it extended to them. The question here is, is this a valid statute as prescribing limitations for actions in the state courts? That the state has lawful authority to prescribe limitations for all actions that may be brought in its courts, is too well settled to need argument or citation of authorities in this court.

2. The fact that the statute prescribes a shorter period of limitation for actions upon judgments of courts of other states and territories, and of courts of the United States, than is prescribed by section 15 for judgments of courts of record of this state, does not affect its validity. That fact might be urged, with great force possibly, against the *policy* of the statute; but as against the *power* of the legislature to pass it, it can have, we submit, no force whatever. And it is the *power* of the legislature, not the *policy* of its action, that is here under review.

3. Such shorter limitation has already been held valid as regards judgments of courts of other states. And the same arguments are equally potent to sustain such limitation [redacted] judgments of courts of the United States. The power of the state to prescribe a shorter period of limitation for judgments of courts of other states than for judgments of its own courts, is one of its reserved *sovereign* powers. It is thus stated in Angell on Limitations, section 65:

"The [redacted] states under our government may, *in virtue of their reserved sovereignty*, limit the time for remedies even upon the judgments of courts of other states, and altogether bar, by statute, suits upon such judgments, if not instituted within the time prescribed by the statute."

In *McElmoyle vs. Cohen*, 13 Pet., 312, speaking of the power of the states to enact such statutes, the court say at page 327:

"It would be strange, if in the now well understood rights of nations to organize their judicial tribunals according to their

notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their courts. Prescription is a thing of policy, growing out of the experience of its necessity and the time after which suits or actions shall be barred, has been from a remote antiquity, fixed by every nation, *in virtue of that sovereignity by which it exercises its legislation for all persons and property within its jurisdiction.* This being the foundation of the right to pass statutes of prescription or limitation, may not our states, under our system, exercise this right in virtue of their sovereignity? or is it to be conceded to them in every other particular, than that of barring the remedy upon judgments of other states by the lapse of time? The states use this right upon judgments rendered in their own courts; and the common law raises the presumption of the payment of a judgment after the lapse of twenty years. May they not, then, limit the time for remedies upon the judgements of other states, and alter the common law by statute, fixing a less or larger time for such presumption, and altogether barring suits upon such judgments, if they shall not be brought within the time stated in the statute? It certainly will not be contended that judgment creditors of other states shall be put upon a better footing in regard to a state's right to legislate in this particular than the judgment creditors ot the state in which the judgment was obtained. And if this right so exists, may it not be exercised by a state, restraining the remedy upon the judgment of another state, leaving those of its own courts unaffected by a statute of limitations, but subject to the common law presumption of payment after the lapse of twenty years. In other words, may not the law of a state fix different times for barring the remedy in a suit upon a judgment of another state and for those of its own tribunals. We use this mode of argument to show the unreasonableness of a contrary doctrine. But the point might have been shortly dismissed with this sage declaration, that there is no direct constitutional inhibition upon the states, nor any clause in the constitution from which it can even be plausibly inferred that the states may not legislate upon the remedy in suits upon the judgments of other states, exclusive of all interference with their merits."

Bank of Alabama vs. Dalton, 9 How., 522.
Randolph vs. King, 2 Bond (C. C.) 104.
In re Nassau, 2 Central, L. J., 570.
McClintock vs. Rodgers, 12 S. & M., 702.

The same arguments apply with equal force to the right of the states to limit the time for remedies upon judgments of Federal courts. With equal force it may be urged, "It certainly will not be contended that judgment creditors of Federal courts shall be placed upon a better footing in regard to a state's right to legislate in this particular, than the judgment creditors of the state court in which the judgment was obtained. And if this right so exists, may it not be exercised by a state's restraining the remedy upon a judgment of the Federal courts leaving those of its own courts unaffected by a statute of limitations, but subject to the common law presumption of payment after the lapse of twenty years." If the state prescribed no limitation of actions upon its own judgments, then, the common law prescription of twenty years would apply to such actions. But would its failure to pass such act, deprive it of the power to prescribe a shorter period of limitation of actions upon judgments of Federal courts? It certainly would not.

4. It may then be regarded as established law that the state may prescribe limitations for actions upon judgments without regard to the court pronouncing them, whether it be a court of its own or another state. The only inquiry remaining is, does the fact that the court pronouncing the judgment is a Federal court, prevent the state from exercising that power? Brief consideration of the nature of a judgment will be sufficient to show that it does not.

A judgment is simply the evidence of a debt or liability between the parties to the action. It transforms into an indisputable debt or liability of record, what before was a disputable debt or liability, existing only in parol or simple contract. It changes only the evidence of the debt or liability and the manner of enforcing and securing its avails. It still remains, simply and only an evidence of debt or liability between the parties to the action, and no one else. Neither the court pronouncing it, nor its officers, nor the state or government establishing the

court, is, in any way, a party to such debt or liability. No rights, privileges or liabilities of either are granted, secured, preserved or affected thereby. The fact that the court pronouncing it is a Federal court, does not, at all, change its character. It still remains simply an evidence of debt or liability between the parties, and nothing more. It may be sued over in the state courts generally, and in the Federal courts when the proper jurisdictional facts exist. There is, therefore, nothing in the fact that the court which pronounces it is a United States court, that prevents the state from limiting the action on it when brought in its own courts. The fact that the evidence of the debt or liability is declared, signed and preserved by United States officials, makes no difference in this respect. A patent of land issued by the Unites States is likewise so signed and yet it would not be claimed for a moment that an action by the patentee to recover the land would not be barred by ten years adverse possession under the state law.

5. The constitution of the United States contains no prohibition of this power to the states, nor grant of it to the United States, and there is no limitation or prohibition contained in the state constitution. The state legislature, therefore, has power to enact the statute and it is not obnoxious to any constitutional inhabitation or limitation.

It is common knowledge that before adopting the constitution of the United States, the states possessed all legislative power within their respective limits. By adopting that instrument, they simply granted to the general government certain of their powers; but by special provision reserved to themselves all "the powers not delegated to the United States by the constitution nor prohibited to it by the states." (Art. 10, amendments).

On the other hand, the state constitution is to be regarded not as a grant of power but as a limitation upon powers already possessed. So that to determine whether a state possesses a particular power, we are first to ascertain whether the constitution of the United States, contains a grant of that power to the

United States, or a prohibition of it to the state; and second, whether the state constitution contains any prohibition or limitation of that power. If the former contains no such grant or prohibition, and the latter is also free from any such limitation or prohibition, then the state possesses the power in question.

In *Bushnell vs. Beloit*, 10, Wis., 195, it is said at page 225:

"We suppose it to be a well settled political principle that the constitution of the state is to be regarded not as a grant of power, but rather as a limitation upon the powers of the legislature and that it is competent for the legislature to exercise all legislative powers not forbidden by the constitution or delegated to the general government, or prohibited by the constitution of the United States. The legislature, subject to a qualified veto of the executive, possesses all the legislative power of the state."

In *Bank of Alabama vs. Dalton*, 9, How., 522, the court, speaking of a statute of one state limiting actions upon judgments of other states say at page 527:

"In administering justice to enforce contracts and judgments, the states of this Union act independently of each other, and their courts are governed by the laws and municipal regulations of that state, where a remedy is sought, unless they are controlled by the constitution of the United States, or by laws enacted under its authority. And one question standing in advance of others is whether the courts of Mississippi stood thus controlled, and were bound to reject the defense set up under the state laws, because, by the supreme laws of the Union it could not be allowed."

6. It is familiar law that no statute will be declared in conflict with the constitution unless it clearly and unmistakably violates that instrument. The court must be able to point out the particular clause of the constitution violated before it will declare the statute unconstitutional.

Fletcher vs. Peck, 6, Cranch, 87.
Dickson vs. The State, 1, Wis., 122.
State ex rel. Chandler vs. Main, 16 Wis., 398.
Mills vs. Charleton, 29, Wis., 400.
State ex rel. Grundt vs. Albert, 32, Wis., 403.

7. The legislative authority is clearly apparent when we consider the character of statutes of limitation and the power involved in their enactment. They relate solely to the remedy, and establish what circumstances shall be taken as evidence that a contract has been performed. Hence the power involved is simply a power to establish a rule of evidence and that power has never been denied to the states.

In Angell on Limitations, section 22, it was said of statutes of limitations:

"They rather establish that a certain lapse of time shall amount to the evidence of the transfer of property, or of the performance of a contract, than to take away the one, or dispense with the other. In prescribing the evidence which shall be received in its courts, and in giving effect to that evidence a state is clearly within the limits designated by the constitution of the United States."

In *Sturges vs. Crowninshield*, 4, Wheat., 122, the court say at page 207:

"Statutes of limitation relate to the remedies which are furnished in the courts. They rather establish that certain circumstances shall amount to evidence that a contract has been performed, than dispense with its performance."

In *Ogden vs. Saunders*, 12 Wheat., 213, Chief Justice MARSHALL says at page 349:

"In the case of *Sturges vs. Crowninshield*, it was observed by the court that these statutes relate only to the remedies which are furnished in the courts; and their language is generally confined to the remedy. They do not purport to dispense with the performance of a contract, but proceed on the presumption that a certain length of time unexplained by circumstances, is reasonable evidence of a performance. It is on this idea alone that it is possible to sustain the decision, that a bare acknowledgment of the debt, unaccompanied with any new promise, shall remove the bar created by the act. It would be a mischief not to be tolerated, if contracts might be set up at any distance of time, when the evidence of payment might be lost, and the estates of the dead, or even of the living, be subjected to these stale obligations. The principle is, without the aid of a statute, adopted by the courts as a rule of justice. The legislature has enacted

no statute of limitations as a bar to suits on sealed instruments. Yet twenty years of unexplained silence on the part of the creditor is evidence of payment. On parol contracts, or on written contracts not under seal, which are considered in a less solemn point of view than sealed instruments, the legislature has supposed that a shorter time might amount to evidence of performance, and has so enacted. All have acquiesced in these enactments, but have never considered them as being of that class of laws which impair the obligation of contracts. In prescribing the evidence which shall be received in its courts, and the effect of that evidence, the state is exercising its acknowledged powers. It is likewise in the exercise of its legitimate powers, when it is regulating the remedy and mode of proceeding in its courts."

In *Jackson vs. Lamphire*, 3, Pet., 288, it is said on page 290:

"It is within the undoubted power of state legislatures to pass recording acts; * * such, too, is the power to pass acts of limitations and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity can not be questioned."

8. This court recited these statutes and expressed no dissent from the construction and validity of the sections we contend for here. In *Koshkonong vs. Burton*, 14, Otto, 668, the court say respecting them on page 670:

"The revision of 1849 was superseded by one made in 1858, which went into operation on the first day of January, 1859. By the latter, as modified by an act passed in 1861, civil actions, other than for the recovery of real property were required to be commenced within the following periods: Actions upon judgments or decrees of courts of record of the state and actions upon sealed instruments when the cause of action accrued in the state, within twenty years. (Rev. Stat. Wis., 1858, c. 138, sec. 15): Actions upon the judgments or decrees of courts of record of any state or territory of the United States *or of courts of the United States*, and actions upon sealed instruments, when the cause of action accrued out of the state, within ten years (sec. 16); and actions upon contracts, obligations or liabilities, express or implied, excepting those mentioned in sections 15 and 16, within six years, the time to be computed, in each case, from the date when the cause of action accrued.

* * Thus stood the law of the state until the 9th day of March, 1872, etc."

The cases cited by the learned counsel for the plaintiff in error are not in conflict with the views we urge. *United States vs. Thompson*, 98 U. S. 486, went upon the very familiar theory that exemptions are a prerogative of the sovereign which can be surrendered only by the act of the sovereign, and one sovereign cannot surrender it for another. *Farmers' & Mechanics' National Bank vs. Dearing*, 91 U. S., 29; *McCullough vs. Maryland*, 4 Wheat., 316; *Bank of Commerce vs. Commissioners of New York City and County*, 2 Black, 620, went the two former upon the ground that the bank was an instrumentality of the government, used by it to carry on the affairs of the government, and the state could not tax it or apply its usury laws to its contracts; and the latter case upon the ground that the stocks and bonds of the government were like instrumentalities and could not be taxed by the state.

The *Chicago & Northwestern Railroad Company vs. Whitton*, 13 Wall., 279, *Home Insurance Company vs. Morse*, 20 Wall., 445, and *Abelman vs. Booth*, 21 How., 506 were all cases where it was sought by state laws to circumscribe the jurisdiction of Federal courts as established by the constitution and acts of Congress, or, as in *Abelman vs. Booth*, where the state court assumed to revise and annul the judgments and proceedings of Federal courts.

III.

The statute in question does not attempt to define or limit rights of persons conferred by the Federal government, as claimed by the plaintiff in error.

1. His rights under the judgment were not conferred by the government, but originated in the city bond which preceded the

judgment and on which the latter was based. Without a bond the plaintiff in error was without right to the judgment, and the latter followed solely as a consequence of the former. The stipulations of the bond conferred plaintiff's rights and the bond was the evidence of them. When merged in judgment, the latter became such evidence, but not the origin of his rights. The judgment declares what the already existing rights of the parties are but does not confer or originate those rights. The Federal government no more confers rights thus declared by a Federal judgment, than the state government confers rights declared by a state judgment.

2. Statutes of limitation are not embraced in the class of laws forbidden by the constitution as impairing the obligation of contracts or disturbing vested rights. They operate upon the remedy only, and there is a broad distinction between the obligation of a contract and the remedy to enforce it.

The obligation of a contract is the duty or liability raised by the language used in it. It comes into being when the contract is executed, and is coeval with its existence. What it is, how defined and how limited is determined only by construction of the language of the contract.

The remedy is the means provided for enforcing the obligation. It comes into being only when the latter has been violated. It is separate and distinct from both the obligation and the contract. It is not conferred by the contract — cannot be resorted to if the terms of the contract are performed, and becomes operative only when the parties neglect or refuse to perform the stipulations of the contract. As said in Mr. Angell's work on Limitations, sec. 22, "The difference between the obligation of a contract, and the remedy to enforce it, is that they originate at different times. The obligation to perform is coeval with the making of the contract and operates anterior to the time of per-

formance. The remedy, on the other hand, can not be applied to a contract until it is broken; and then it is applied to enforce a pre-existing obligation."

The distinction has been frequently announced by this court, and in cases quite in point here. In *McCluny vs. Silliman*, 3 Pet., 270, plaintiff brought action in the United States Circuit Court of Ohio against defendant as Register of the Land Office at Zanesville for refusing to enter on the books of his office applications for the purchase of certain lands, according to the act of Congress of May 18th, 1796. Defendant pleaded in bar the Ohio statute of limitations providing that "all actions on the case shall be sued or brought within six years next after the cause of action arose." Demurer to plea overruled and action held barred.

That was a strong case. The plaintiff claimed his right under an act of Congress, and defendant was an officer of the government. On appeal to this court it was claimed, "That no statute of limitations of the state of Ohio could be pleaded to an action on the case brought by a citizen of one state against a citizen of another in the circuit court of the United States, for malfeasance in office of a ministerial officer of the government, *and especially where the plaintiff's right accrued to him under a law of Congress.*"

It was contended, *arguendo*, that the statute should not be so construed as to interpose a bar to the action against an officer of the United States, and also that, "If the power of state legislatures to limit actions against officers of the United States, is admitted, the power over those officers might be exercised in other and in oppressive provisions." And yet, the court held that the statute applied and barred the action. And it was upon the theory, that the statute did not affect the liability or rights of the parties secured by the act of Congress, but only the remedy for enforcing those rights and that the state had the undoubted power to legislate by prescribing the time within

which parties might enter its courts to enforce the remedy, and having done so, the act of Congress applied the state limitations to the United States courts.

So here, the statute does not impair or disturb the rights secured by and held under the judgment. It only declares within what time the remedy to enforce those rights must be invoked.

In *United States Bank vs. Donnally*, 8 Pet., 361, the action was upon a promissory note, executed and made payable in Kentucky, brought in the District Court of the United States for the western district of Virginia. The Kentucky statute provided that such writings "shall be placed upon the same footing with sealed writings, containing the like stipulations, receiving the same consideration in all courts of justice and, to all intents and purposes having the same force and effect * * as if sealed." The Virginia statute, pleaded in bar, provided that "All actions of debt grounded upon any lending or contract without specialty," should be commenced within five years.

There the plaintiff was the United States bank claiming its rights under Federal legislation and it was contended that the contract by the law of the place where it was made and was to be performed, was a specialty, having as such a longer limitation than provided by the Virginia act, and that to apply the latter's five years limitation to it would impair its obligation validity and effect. But the court held otherwise, that the statute applied and barred the action because it affected not the validity of the contract or its obligation but only the remedy upon it, and at page 372, uses this language as to the power of the state to legislate upon the one and not the other.

"The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the law of the country where the contracts are made and are to be performed. But the remedies are to be governed by the laws of the country where the suit is brought; or, as it is compendiously expressed, by the *lex fori*. No one will pretend that because an action of covenant will lie in Kentucky on an unsealed contract made in that state, therefore, a

like action will lie in another state where covenant can be brought only on a contract under seal. It is an appropriate part of the remedy which every state prescribes to its own tribunals, in the same manner in which it prescribes the times within which all suits must be brought. The nature, validity and interpretation of the contract may be admitted to be the same in both states; but the mode by which the remedy is to be pursued, and the time within which it is to be brought may essentially differ."

In *McElmoyle vs. Cohen*, 13, Pet., 312, a South Carolina, judgment was sued over in Georgia. It was held that the five years' limitation of the latter state, being shorter than the prescription prevailing in the former, was a bar to the action, and the court after declaring the effect to be given to judgments of one state in another, say at page 327:

"Such being the faith, credit and effect to be given to a judgment of one state in another, by the constitution and the act of Congress, the point under consideration will be determined by settling what is the nature of the plea of the statute of limitations. *Is it a plea that settles the right of a party on a contract or judgment, or one that bars the remedy?* Whatever diversity of opinion there may be among jurists upon this point, we think it will settled to be a plea to the remedy; and, consequently, that the *lex fori* must prevail."

Sturges vs. Crowninshield, 4, Pet., 122, was an action in the United States circuit court for Massachusetts on promissory notes made in New York. Defendant pleaded his discharge under the insolvent laws of New York which were held invalid as impairing the obligation of the contract. It was contended *arguendo* that by the same reasoning, limitation laws must be held void as they also impaired such obligation. But the court distinguished them saying, pages 206-7:

" By way of analogy, the statutes of limitations, and against usury have been referred to in argument; and it has been supposed that the construction of the constitution which this opinion maintains, would apply to them also, and must therefore be too extensive to be correct. We do not think so. Statutes of limitation relate to the remedies which are furnished in the courts. They rather establish that certain circumstances shall

amount to evidence that a contract has been performed, than dispense with its performance."

In *Ogden vs. Saunders*, 12, Wheat., 213, a like question arose, like argument was used by counsel and the court disposed of it in the same way, saying, after speaking of usury laws, pages 348–9:

"Acts of limitation approach more nearly to the subject of construction but are not identified with it. They defeat a contract once obligatory, and may, therefore, be supposed to partake of the character of laws which impair its obligation, but a practical view of the subject will show us that the two laws stand upon distinct principles. In the case of *Sturges vs. Crowninshield* it was observed by the court, that these statutes relate only to the remedies which are furnished in the courts; and their language is generally confined to the remedy. They do not purport to dispense with the performance of a contract, but proceed on the presumption that a certain length of time, unexplained by circumstances, is reasonable evidence of a performance."

Again on pages 349–350, the court, after stating the contention of plaintiff's counsel, that obligation and remedy are identical, proceeds as follows:

"The answer given to this proposition by the defendant's counsel seems to be conclusive. They originate at different times. The obligation to perform is coeval with the undertaking to perform; it originates with the contract itself and operates anterior to the time of performance. The remedy acts upon a broken contract and enforces a pre-existing obligation."

IV.

The Supreme Court of Wisconsin has construed the statute and held that sub-division one of section 16, chap. 138, R. S., 1858, prescribes the limitation for actions upon judgments of United States courts recovered before the adoption of the revision of 1878, and that it is valid.

Waterman, Adm'r. vs. Town of Waterloo, 69 Wis., 260.

In plaintiff's former brief, it was intimated that that case was carried through the courts with undue expedition. But the volume in which it is reported shows that many of the cases therein consumed no more time, and some less, than this one. The fact is, the Wisconsin practice is such that cases usually reach decision in the supreme court within a year or a year and a half after their commencement.

The construction given to the statutes of a state by the highest judicial tribunal of such state will be adopted and followed by this court; the rule being as declared in *Leffingwell vs. Warren*, 2 Black, 599. "The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute and is as binding upon the courts of the United States as the text," and many previous decisions of the court to the same effect are there cited.

The Waterman case was commenced and determined while the present action was pending. There can not therefore be claimed for it that conclusive effect here that an earlier decision of it might be entitled to. But we do claim, as said by this court, "Even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean toward an agreement of views with the state courts if the question seems to

them balanced with doubt." *Burgess vs. Seligman*, et al., 17 Otto 20. We claim for it also the respectful consideration due to the decision of the highest court of a state respecting the meaning and validity of a statute of such state, which, as repeatedly said here, is "always entitled to the highest respect of the Federal courts."

Bucher vs. Cheshire R'd Co., et al. 125, U. S., 555.

In the Waterman case, the question was raised in precisely the same way as here. The first cause of action there was upon a judgment of the Circuit Court of the United States for the District of Wisconsin rendered Sept. 16th, 1866. The action was commenced Aug. 26th, 1886, and to this cause of action, defendant pleaded the ten years limitation prescribed by sub-division one of section 16, chapter 138, R. S., 1858, and the court held it applied to and barred the action. After stating that the only question was whether said ten years statute applied to and ruled the case, the court say:

"This is a new question in this court, but we do not think that there is the least possible doubt about the construction of this statute; indeed, the language is too plain and explicit to admit of construction. It has but one meaning. Sec. 16, ch. 138, R. S. 1858. 'Within ten years. (I.) An action upon a judgment or decree of any court of record of any state or territory, within the United States, *or of any court of the United States*.' This cause of action is a judgment of a court of the United States and, therefore within the very language of this statute and barred by it. Previous to this statute, the judgments of all courts of record were barred in twenty years. In 1858 the legislature saw fit to bar all judgments or decrees of state courts other than those of this state, and of all territorial courts, and of any court of the United States, in ten years, and leave the twenty years limitation upon a judgment or decree of any court of record of this state as in section 15.

In the revision of 1878, in section 4220, the judgments or decrees of United States courts sitting within this state were placed with judgments and decrees of the courts of record of this state, under a bar of twenty years, and the revisors say in

their note to said section: 'Judgments of United States courts in this state are put on the same footing as domestic judgments as manifestly proper.' Who put them on the same footing and when were they put on the same footing as domestic judgments? Why the revisors, and by the revision, as a matter of course. Most certainly the history of this legislation, and the changes manifestly made, do not cast any doubt upon the plain and obvious meaning of this language. Any argument of construction based upon this language might imply a doubt where none can exist. Similar language in the state insolvent law of Minnesota, in *Simon vs. Mann*, 33 Minn., 413, was held to include the circuit court of the United States for the District of Minnesota, but only 'in view of the scope and practice of the insolvent law.' That the circuit courts of the United States are properly called domestic courts of the states wherein they are held, could not possibly change the meaning of this language, 'or of any court of the United States,' without destroying it entirely. What other United States Courts, except the district and circuit courts of the United States render judgments upon which the statute of limitations can run? The revisors seemed to think that they had put the judgments of these courts upon the footing of domestic judgments by an amendment in the revision; not to make them domestic, but "to put them on the same footing" under the limitation law. The authorities cited by the learned counsel of the appellant have no possible application or effect to cast a doubt on this plain language of the statute. It has been very properly changed in the revision of 1878, but we must administer the law applicable to this case as we find it."

The manuscript case of *Cole vs. Weil*, decided by District Judge A. G. Miller, in 1870, is not entitled to weight here. That decision was reviewed and held unsound by Judges Gresham and Bunn in the present case, and was not followed by the supreme court of Wisconsin in the Waterman case, though urged on its attention. It was never reported nor was it generally known and certainly could not be considered as having settled the construction of the statute.

V.

The statute being valid as applicable to the state courts, sec. 34 of the judiciary act of 1789 (being section 721, R. S.) applies it to and makes it valid in the Federal courts also.

Angell on Limitations, Sec. 24.

This court has given frequent expression to this doctrine, saying, in *McCluney vs. Silliman*, 3 Pet., 270 at page 277, "Under this statute, the acts of limitations of the several states, where no special provision has been made by congress, form a rule of decision in the courts of the United States and the same effect is given to them as is given in the state courts." In *Bank of Alabama vs. Dalton*, 9 How., 522, it is said, "That acts of limitation furnish rules of decision, and are equally binding on the Federal courts as they are on State courts, is not open to controversy; the question presented is one of legislative power, and not practice." In *Leffingwell vs. Warren*, 2 Black., 599, "The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the Statute of Limitations of the several states, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the 34th section of the judiciary act of September 24th, 1789, chapter 20. The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text." In *Ross et al. vs. Duval et al.*, 13 Pet., 45, at page 60. "If this, then, be a limitation law, it is a rule of property; and under the 34th section of the judiciary act, it is a rule of decision for the courts of the United States." In *Wayman et al. vs. Southard et al.*,

10 Wheat., 1, at page 48. "This section is unquestionably prospective, as well as retrospective. It regards future as well as existing laws." In *United States vs. Mundell*, 6 Call., 245, it is said: "under section 34 of the judiciary act, the existing statutes of the state, when applicable, must be considered in the same manner as if the words of the state law had been adopted and specially re-enacted by act of congress."

The whole matter is thus summed up in *Tioga R'd Co., vs. B. & C. R'd Co.*, 20, Wall., 137:

"In Angell on the Limitation of Actions at Law, at page 14, sec. 24, the author says: 'Under the 34th section of the judiciary act of 1789, 1, Stat. at L., 73, the Acts of Limitations of the several states, where no special provision has been made by congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the state courts. In accordance besides, to a steady course of decision for many years, the federal judiciary feel it an incumbent duty carefully to examine and ascertain if there be a settled construction by the state courts of the statutes of the respective states where they are exclusively in force, and to abide by and follow such construction when found to be settled. There is no unwritten or common law of the Union. The rule of action is found in the different states as it may have been adopted and modified by legislation and a course of judicial decisions. The rule of decision must be found in the local law, written or unwritten."

As already observed, chapter 138 does not undertake to limit actions on judgments when brought in Federal courts, but only when brought in the state courts. Then the act of Congress provides, in effect, that the limitations thus prescribed by the state for actions in its courts, shall be the limitations for the same actions when brought in Federal courts. Thus the limitation of the action in the latter courts is prescribed, not by the state law, but by the act of Congress; the latter providing that the periods of limitation prescribed by the state for the actions in its courts, shall be the periods of limitation in the Federal courts. The limitations prescribed by the state law prevail in the Federal

courts, not because of the state law by any means, but because of the act of Congress providing they shall prevail there. So that applying here the principles announced in the foregoing cases, and the case stands the same as if there were a separate act of Congress prescribing, in so many words, a ten years limitation for this action.

GEO. W. BIRD,
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Attorneys for Defendant in Error.

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JAMES H. McKENNEY,
CLERK
153-671

Supreme Court of the United [illegible]

October Term, 1893.

No. 18.

ELIAB W. METCALF,

Plaintiff [illegible]

vs.

THE CITY OF WATERTOWN,

Defendant [illegible]

ADDITIONAL BRIEF OF DEFENDANT IN ERROR.

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DEMOCRAT PRINTING COMPANY, PRINTERS, MADISON, WIS.

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 18.

ELIAB B. METCALF,

Plaintiff in Error.

vs.

THE CITY OF WATERTOWN,

Defendant in Error.

ADDITIONAL BRIEF OF DEFENDANT IN ERROR.

In its former briefs filed, defendant in error seeks to establish the following three propositions:

1. That the ten years statute of limitations under investigation (sec. 16, ch. 138, R. S. 1858, Wis.) prescribes the limitation for commencing this action; (pages 2 to 23).

2. That such is the construction placed upon it by the Supreme Court of Wisconsin in *Waterman Adm'r vs. Town of Waterloo*, 69, Wis., 260, and that construction will be adopted and followed by this court; (37 to 42).

3. That the statute is a valid exercise of legislative power, and not violative of any constitutional provisions (pages 23 to 37).

Re-inviting attention to the arguments and authorities contained in those briefs, we beg the indulgence of the court to submit this additional brief upon the third proposition, to-wit: The validity of the statute.

I.

The Wisconsin statute (subdiv. 1, sec. 16, ch. 138, R. S., 1858,) prescribing a limitation of ten years for actions upon judgments of Federal Courts and certain other courts of record, is a valid exercise of legislative power.

1. It is established doctrine that the states have full power to prescribe the time within which actions shall be commenced in their own courts.

Angell on Limitations, Secs. 22, 65.
Jackson vs. Lamphire, 3 Pet., 288–290.
McElmoyle vs. Cohen, 13 Pet., 312.
Ogden vs. Saunders, 12 Wheat., 213 at 349.

This power pertains to them in their sovereign capacity, is possessed and exercised by virtue of their reserved sovereignty, and its only limitation is the requirement that the period prescribed shall be reasonable.

Parker vs. Kane, 4 Wis., 1.
Smith vs. Packard, 12 Wis., 371.
Howell vs. Howell, 15 Wis., 55.
Meklem vs. Blake, 22 Wis., 495.
Baker vs. Supervisors, 39, Wis., 444.
Eaton vs. Supervisors, 40, Wis., 668.
Hide vs. Supervisors, 43, Wis., 129.

2. It is also established law that the state may prescribe limitations for actions upon judgments without regard to the court pronouncing them, whether it be its own court, or a court of another state.

Angell on Limit., Sec. 65.
McElmoyle vs. Cohen, 13 Pet. 312.
Meek vs. Meek, 45 Iowa, 294.

It is not disputed but that ten years is a reasonable time within which to commence actions on judgments of federal and state courts. So that we have the naked question whether the state, concededly possessed of ample power to establish limitations for actions upon judgments not only of its own courts but of courts of the other states, has likewise the power to prescribe the time within which actions must be commenced in its own courts upon the judgments also of federal courts.

3. The nature of a judgment is the same whether it be of a Federal or state court, and affords no good reason why this power should be withheld as to the one class of judgments, while it is concededly rightfully accorded as to the other.

A judgment is simply the evidence of a debt or liability between the parties to the action. It transforms into an indisputable debt or liability of record what before was a disputable debt or liability, existing only in parol or simple contract. It changes only the evidence of the debt or liability and the manner of enforcing and securing its avails. It still remains simply and only an evidence of debt or liability between the parties to the action and no one else. Neither the

court pronouncing it, nor its officers, nor the state or government establishing the court, is, in any way, a party to such debt or liability. No rights, privileges or liabilities of either are granted, secured, preserved or affected thereby. The fact that the court pronouncing it is a Federal court, does not at all change its character. It still remains simply an evidence of debt or liability between the parties, and nothing more. It may be sued over in the state courts generally and in the Federal courts when the proper jurisdictional facts exist. There is, therefore, nothing in the fact that the court which pronounces it is a United States court, that prevents the state from limiting the action on it when brought in its own courts. The fact that the evidence of the debt or liability is declared, signed and preserved by United States officials, makes no difference in this respect. A patent of land issued by the United States is likewise so signed, and yet it would not be claimed for a moment that an action by the patentee to recover the land would not be barred by ten years adverse possession under the state law.

When this case was here the first time, it was held, as reported in 128, U. S., 586, that the judgment sued on was a contract and that this action was an action founded on contract within the meaning of the act of March 3, 1875 (18, Stat. at Large, 470, page 137) which provided that no Circuit or District court of the United States shall "have cognizance of any suit founded on contract, in favor of the assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange."

It was sought there to maintain the jurisdiction of the Circuit court upon the theory that the suit was one arising under the constitution or laws of the United States in as much as it was brought upon a Federal judgment. But this court declined to approve such contention and held that although the action was based upon a Federal judgment, the plaintiff was seeking only "to enforce an ordinary right of property, by suing upon the judgment merely as a security of record, showing a debt due from the city of Watertown."

So, as said by this court in *Provident Savings Life Assurance Society of New York v. Ford*, 114, U. S., 635, speaking of a judgment of a Federal court, a judgment is "but a security of record showing a debt due from one person to another," and that a suit on such judgment "is simply the case of an ordinary right of property sought to be enforced," and "nothing more."

It is also to be observed that plaintiff in error's rights under the judgment were not conferred by the government, but originated in the city bond which preceded the judgment, and on which the latter was based. Without a bond the plaintiff in error was without right to the judgment, and the latter followed solely as a consequence of the former. The stipulations of the bond conferred plaintiff's rights and the bond was the evidence of them. When merged in judgment, the latter became such evidence, but not the origin of his rights. The judgment declares what the already existing rights of the parties are but does not confer or originate those rights. The Federal government no more confers rights thus declared by a Federal judgment, than the state government confers rights declared by a state judgment.

So that the contention that this statute attempts to

define or limit rights of persons conferred by the Federable government is not tenable.

4. The state possesses all and absolute legislative power within its limits, except as restricted or prohibited ~~power~~ by the constitution of the United States, or the constitution of the state. Hence, to determine whether a state possesses a particular power, we are first to ascertain whether the constitution of the United States contains a grant of that power to the general government, or a prohibition of it to the state; and second, whether the state constitution contains any prohibition or limitation of that power. If the former contains no such grant or prohibition, and the latter is also free from any such limitation or prohibition, then the state possesses the power in question.

Bank of Alabama vs. Dalton, 9 How., 522.
Bushnell vs. Beloit, 10 Wis., 195.
Giozza vs. Tiernan, 148 U. S., 657.

It is not claimed that the constitution of Wisconsin contains any such prohibition or limitation. So that attention is to be confined in this regard to the constitution of the United States.

5. It is familiar law that no statute will be declared in conflict with the constitution unless it clearly and unmistakably violates that instrument. It may be said also that the court should be able to point out the particular clause of the constitution violated before it will be justified in declaring the statute unconstitutional.

Fletcher vs. Peck, 6 Cranch, 87.
Dickson vs. The State, 1 Wis., 122.
State ex rel. Chandler vs. Main, 16 Wis., 398.

Mills vs. Charleton, 29 Wis., 400.
State ex rel. Grundt vs. Albert, 32 Wis., 403.
Tyler vs. The People, 8 Mich., 333.

As said by the supreme court of Michigan in the last case:

"To warrant us in declaring a statute unconstitutional, we should be able to lay our finger on the part of the constitution violated, and that the infraction should be clear and free from a reasonable doubt."

Two elements must, therefore, concur to warrant the court in adjudging the act unconstitutional; first, there must be some provision of the constitution which it violates; and, second, the violation must be clear, palpable and free from reasonable doubt. While the court should not assume doubts simply because an effort of the mind is required to discover the truth, it should, as said by the supreme court of Wisconsin (*In re. Oliver*, 17 Wis., 681), "be equally free from seizing upon a general principle and applying it without proper discrimination to invalidate the law, if by any fair reasoning and honest interpretation it can be allowed to stand, or if, after exhausting these, a substantial doubt remains whether it ought to be held void."

II.

The statute under inquiry violates no provision of the constitution of the United States.

1. It is not claimed that the constitution contains any specific grant by the states of any portion of the absolute power to pass statutes of limitations which

they possessed before the ratification of that instrument. Nor is it contended that there can be found in the constitution any prohibition, in terms, of the exercise of that power by the states to the full extent of its original unlimited completeness. But while it is not asserted that there is any such specific grant or prohibition, it is, nevertheless, argued that there are three general provisions of the constitution with which this statute conflicts, and those provisions we will now proceed to consider.

2. The three sections claimed to be violated by this statute are (a) sec. 10 of art. 1, prohibiting the states passing any law impairing the obligation of contracts; (b) sec. 2 of art. 4, securing to citizens of each state all privileges and immunities of citizens of the several states; and (c) sec. 1 of the 14th amendment. But we respectfully submit that the statute is not in conflict with either one of these sections.

(a) It does not conflict with the clause of sec. 10, art. 1, which provides, that no state shall pass any law impairing the obligation of contracts.

The full and complete answer to the objection to the statute based on this clause, is, statutes of limitations operate only upon the remedy, and, therefore, are not embraced in the class of laws forbidden by that section. This doctrine is established by an unbroken current of authority, and we need only re-invite attention to our argument and cases cited on the proposition on pages 32 to 36 of our former brief.

Angell on Limit., Sec. 22.

Wood on Limit., Sec. 11, p. 36 et seq.

McCluny vs. Silliman, 3, Pet., 270.

U. S. Bank vs. Donnally, 8, Pet., 361–372.
MrElmoyle vs. Cohen, 13, Pet., 312–327.
Sturges vs. Crowninshield, 4, Wheat., 122–206.
Ogden vs. Saunders, 12, Wheat., 213–348.
Hawse vs. Bergmire, 4, Col., 313.
Davidson vs. Lawrence, 49, Ga., 335.

(b) The statute does not conflict with the part of sec. 2, art. 4, which declares, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

(1) This section secures to the citizens of each state the same, and only the same, rights in every other as are accorded by the latter to its own citizens. So long as the law does that, it does not violate this provision. In the language of an early case (*Crandall vs. the State*, 10 Conn., 339, found on page 343), "The plain and obvious meaning of this provision is to secure to the citizens of all the states, the same privileges as are secured to our own, by our own state laws."

And as this court said authoritatively in the Slaughter House cases, 16 Wall., 36, at page 77, speaking of this clause of the constitution:

"Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of rights to citizens of other states within your jurisdiction."

It is quite apparent that this statute accords to the citizens of Wisconsin no right or privilege, it does not, in like manner and in equal degree, secure to the citizens of every other state of the Union. A citizen of Ohio, owning a Federal judgment against a citizen of Wisconsin, may sue it in Wisconsin in a Federal court

or court of that state; but in whichever he sues, he must do so within ten years after the entry of the judgment. A citizen of Wisconsin, owning a like judgment can sue only in the state court, and when he so sues, he, too, like the citizen of Ohio, is confined to the same period of ten years for bringing his action.

(2.) This court has already decided that this statute, in providing that when the defendant is out of the state, it shall not run against the plaintiff, if the latter resides in the state, but shall, if he resides out of the state, does not violate this section of the constitution.

President, Etc., of the Chemung Can. Bk. vs. Lowery, et al, 93 U. S., 72.

In that case a judgment of a New York state court recovered June 14, 1862, was sued over in the United States court for the Western District of Wisconsin January 24, 1873. The complaint alleged defendant did not come into Wisconsin or become a resident thereof until in 1864. A demurrer to the complaint on the ground that the action was not commenced within the time limited by this very statute was sustained and the plaintiff appealed to this court.

Two questions were presented and determined there; first, could the bar of the statute be taken advantage of by demurrer, and second, was this statute an infraction of sec. 2 of article 4 of the constitution, by reason of the above mentioned discrimination between resident and non-resident plaintiffs. This court affirmed the judgment, and, on the constitutional question say:

"This statute may be expressed shortly thus; when the defendant is out of the state, the Statute of Limitations shall not run against the plaintiff, if the latter resides in the state, but shall, if he resides out of the state. The argument of the plaintiff is, that, as the law

refuses to non-residents of the state an exemption from its provisions, which is accorded to residents, it is repugnant to that clause of the constitution of the United States (Art. 4, sec. 2) which declares that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.' It is contended that, if the resident creditors of the state may sue their non-resident debtors, at any time within six or ten years after their return to the state, non-resident creditors ought to have the same privilege; or else an unjust and unconstitutional discrimination is made against them. This seems at first view, somewhat plausible, but we do not regard the argument as a sound one. There is, in fact, a valid reason for the discrimination. If the statute does not run as between non-resident creditors and their debtors, it might often happen that a right of action would be extinguished perhaps for years in the state where the parties reside; and yet, if the defendant should be found in Wisconsin, it may be only in a railroad train, a suit could be sprung upon him after the claim had been forgotten. The laws of Wisconsin would thus be used as a trap to catch the unwary defendant, after the laws which had always governed the case had barred any recovery. This would be inequitable and unjust."

(c.) The statute does not violate any of the provisions of Sec. 1, of the 14th amendment.

(1.) That amendment protects from the hostile legislation of the states, the privileges and immunities of citizens of the United States as distinguished from the privileges and immunities of citizens of the states. The privileges and immunities of citizens of the states, and which they possess because of such citizenship, must continue to rest for their security and protection where they did before this amendment; that is, under the care of the state governments, and they receive no additional protection by reason of this amendment. That is the doctrine of this court as established in the Slaughter-House cases, 16 Wall., 36.

Whatever privileges and immunities of the plaintiff in error are claimed to be invaded by this statute are privileges and immunities pertaining to him as a citizen of the state of Ohio and not distinctively as a citizen of the United States.

(2.) The statute does not violate the last clause of the amendment securing equal protection of the laws for all. That clause merely requires that all persons and property subject to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and the liabilities imposed; and, whenever the law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied.

Wurts vs. Hoagland, 114, U. S., 606.
Hayes vs. Missouri, 120 U. S., 68.
Walscon, et al vs. Nevin, et al, 128 U. S., 578.

(d) The power to pass statutes of limitations is limited by the requirement that the time prescribed shall be reasonable. Its exercise, therefore, does not come within the purview of the cases holding that a state cannot exercise a power with reference to an instrumentality created for carrying on the general government which would involve a destruction of that instrmentality. Instances of those cases are where attempts have been made to tax United States banks, stocks or bonds, and it has been uniformly held it could not be done, because the taxing power was absolute and unlimited, and might, therefor, result in the destruction of those instrumentalities.

III.

The statute prescribes limitations for actions in the state courts only, and being valid as applicable to the state courts, sec. 721, R. S., applies it to and makes it valid in the federal courts also.

In addition to the authorities cited on this proposition, on pages 40 and 41 of our former brief, we desire to invite attention to the recent case of *Bauserman vs. Blunt*, 147 U. S., 647. It is there said by the court:

"No laws of the several states have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a state, and as construed by its highest court."

It is further said in that case:

"The construction given by the supreme court of a state to a statute of limitations of the state will be followed by this court, even in a case decided the other way in the circuit court, before the decision of the state court."

And it was also held in that case that the court would follow in such cases the varying decisions, should there be such, of the highest court of the state whose statute was under review, and, upon that subject, the court say:

"Upon the question how far the saving clause as to married women in a statute of limitations is affected by a subsequent statute of the state enlarging the rights of married women, this court, in two comparatively recent cases, has come to different conclusions by following in each case a single decision made by the highest court of the state since the case was brought to this court from the circuit court of the United States."

IV.

Upon the question whether a state statute of limitations controls actions in Federal courts to enforce rights secured by acts of Congress or government patents, we desire to cite, (in addition to *McCluny v Silliman*, 3, Pet., 370, and *U. S. Bank v. Donnally*, 8, Pet., 361, found on pages 33 and 34 of former brief,) the cases of *Bicknell v Comstock*, 113, U. S. 149, and *St. Paul, S. & T. F. Ry. Co. v. Sage* 1, C. C. A. 256.

The Bicknell case was an action for breach of covenants of warranty brought in the United States Circuit Court for the Western District of New York. The breach relied on was that the superior title was in the state of Iowa under a congressional grant to that state. The defense was adverse possession by Bicknell and his grantees for more than ten years, the period for bringing such actions prescribed by the statute of Iowa. It was held a good defense.

The Sage case was an action to recover lands granted to the Territory of Minnesota by an act of Congress to aid in the construction of a railroad, and by the legislature of the territory granted to plaintiffs predecessors and duly certified to the state. The lands were claimed also by Sage under certain acts of Congress as the grantee of another railroad company. The action was to recover the lands and to account for the proceeds of such as had been sold. The Minnesota statute of limitations was pleaded to the action and it was claimed that as the lands were held immediately under the act of Congress, the state statute could not bar the action. Replying to this contention, the court say:

"We propose to first consider the questions arising

upon the plea of the state statute of limitations, the overruling of which is assigned as error. On behalf of the complainant it is argued that when courts of the United States, sitting in equity, are called upon to determine and enforce rights arising under acts of congress, the provisions of a state statute of limitations cannot be made applicable thereto. Where rights to property are created by acts of Congress, and the procedure for enforcing or protecting the same is likewise created by congressional action, and the jurisdiction is cenferred exclusively upon the Federal courts, as in matters pertaining to patents and the like, then it may well be claimed that state statutes of limitation do not apply thereto; but in cases wherein the jurisdiction over the subject matter of controversy is concurrent in the State and Federal courts, why should not force be given to the state statute in both courts? * * * In Minnesota, the statute in terms is applicable to proceedings at law and in equity, and is therefore binding upon the state courts, without regard to the nature of the jurisdiction that is being exercised in the given case."

After citing the decisions of this Court, holding state statutes of limitations binding and obligatory upon the Federal courts, the opinion proceeds:

"There is nothing in the subject matter of the controversy now before the court that takes the case out of the general rules thus enunciated by the supreme court. The land described in the bill is situated in the state of Minnesota. The original parties to the litigation are both corporations created under the laws of that state. The question in dispute between them is, which party is the owner of the land; and while the settlement of that question involves among other matters the construction of the several acts of Congress making grants to the state of Minnesota to aid in the construction of certain lines of railway, that fact does not make the litigation solely and exclusively of Federal jurisdiction. This proceeding to settle the rights of the respective parties to these lands could have been brought in the proper court of the state of Minnesota, and its jurisdiction to hear and determine all questions arising in the

case would have been beyond dispute. If the suit had been thus brought in the state court, can it be doubted that it would have been the duty of that court to give full force to the state statute of limitations had the same been pleaded in the case? If any of the provisions of the statute—a statute wisely enacted to give stability to titles, thereby promoting confidence and encouraging the improvement of the lands of the state, and intended to prevent the evil of parties waiting until by lapse of time valuable evidence may be rendered difficult of procurement or wholly unattainable, and then preferring doubtful and speculative claims—would have barred the statute if brought in the state court, why should not the same bar be effectual when the proceeding is in the Federal court? Upon both principle and authority, we are of the opinion that the case is one in which the Federal court, sitting in equity, should give the same force and efficacy to the provisions of the state statute that would be given thereto if the cause were pending before a court of the state of Minnesota."

V.

This statute has been before this court in two cases prior to this one, wherein it was discussed, but no suggestion made that it was invalid.

Koshkonong vs. Burton, 14, Otto, 668–670.

Pres. etc., of the Chemung Can. Bk. vs. Lowery, et al, 93, U. S. 72.

In the latter case the constitutionality of the act was directly raised and passed upon, although the precise question here involved was not raised or determined.

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Attorneys for Deft. in Error.

Supreme Court of the United States,
CLERK.

OCTOBER TERM, 1894.

No. 64.

ELIAB W. METCALF, Plaintiff in Error,

vs.

THE CITY OF WATERTOWN, Defendant in Error.

Supplemental Brief of Defendant in Error.

GEO. W. BIRD,
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SUPREME COURT of the UNITED STATES.

ELIAB W. METCALF, Plaintiff in Error,

vs.

THE CITY OF WATERTOWN, Deft. in Error.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

The question here is solely as to the validity of the ten years statute of limitations of the State of Wisconsin, for the commencement of actions to recover
Fol. 1. upon United States Court judgments, enacted in her Revised Statutes of 1858, at section sixteen, (16) of Chapter one hundred and thirty-eight (138) on page 821 of said Wis. Revision.

The record (fol. 13) shows that the above entitled action, brought here for review, is based on a judgment of the Circuit Court of the United States for
2. the District of Wisconsin, rendered May 8, 1866.

The action herein in the Court below to collect said judgment was first commenced, and first attempted to be commenced, on the 24th day of July, 1883, (Fol. 4 of record) when the Defendant, City of Watertown, voluntarily appeared more than seventeen (17) years after the rendition of said judgment. No attempt or effort had ever been made to collect it before. (Fol. 5 of record.)

I.

That the statute of limitations of the State of Wisconsin, Sec. 16, Chapter 138, R. S. of 1858, in its own Courts, bars this action on this U. S. Court
3. judgment after the lapse of ten years from its rendition, is so clear that the question is not even debatable, if it be a valid law.

II.

It is a local law. Its limits are the state, an enactment of its legislature, the lex fori of Wisconsin.

III.

It is a valid law. It is but the exercise of the sovereign authority of the State of Wisconsin, through its legislature, over its own tribunals. Any con-
4. stitutional restriction against this exercise of its sovereign authority, over its own Courts, will be sought for in vain.

IV.

This law neither assumes by its own authority to control, nor was it intended to control, any United States Court by its own force in the least degree, nor does it. It was made for the State of Wisconsin, and for its Courts alone, to furnish them the rule of their decisions, as to the commencement of actions in its own Courts on U. S. Court judgments.

V.

The idea of Plaintiff in Error that the bar of the time for commencement of actions or limitations
5. thereon, on both State Court and U. S. Court judgments, must be absolutely equal, is a mistake. Wisconsin, in virtue of her sovereignty, could not only make the time of the bar or limitations of actions to differ on judgments of all her different classes of Courts, but also on judgments of the same class of her Courts, in every county in the State, subject
6. only to the condition that the time in no case shall be so short as to impair the obligation of a contract. Is not ten years ample time? Then what is there to complain of? And what show or pretense is there for the equality of time contended for? If the

law had made it thirty years, instead of ten years, it would have been valid.

In Tioga R. R. Co. vs Blossburg & C. R. R., 20 Wal. 137 p. 150 per Hunt J., the Court says: "Statutes of limitations are in their nature arbitrary
7. They rest upon no other foundation than the judgment of a State as to what will promote the interests of its citizens. Each determines such limits and imposes such restraints as it thinks proper."

VI.

The idea put forward that this 10 years statute of limitations deprives citizens of other States of privileges enjoyed by citizens of Wisconsin, is a mistake. A citizen of Wisconsin suing a citizen of New York in one of the United States Circuit Courts of Wisconsin, recovers judgment. A citizen of New York suing
8. a citizen of Wisconsin in the same Court, also recovers judgment at the same time. Then after the lapse of ten years, both of these Plaintiffs sue over their respective judgments, thus obtained, in a Wisconsin State Court. Both meet the bar of this statute and both are defeated alike. Now where is the inequality of privileges, or of disabilities of citizens of different States under said law?

VII.

But how happens it that the bar of the statute of limitations on United State Court judgments rendered within the State, in all the United States Circuit
9. Courts of Wisconsin, is the same as the State Courts hold on the same class of U. S. Court judgments? Not by the effect or direct force of any State law. The judicial power of the United States is vested in this Court, "and in such inferior Courts as the Congress may from time to time ordain and establish."

In the creation and organization of these "inferior Courts," within the limits of the constitution, the authority of Congress is supreme. And by its omnipotent power it has by the 34th Section of the
10. Judiciary Act of 1789, now Sect. 721 of the U. S. R. S., made it mandatory upon the U. S. Circuit

Court for the Western District of Wisconsin to ascertain what this State law of limitation is on U. S. Court judgments, rendered within the limits of the same State, and then decide every issue and question arising under it, just as the State Courts would and ought to decide it. When the State law applicable itself is once ascertained, it is all controlling. And that there is no
11. right to vary a hair's breadth from it, is the uniform doctrine of this Court during the entire period of its existence. And that statutes of limitations do apply, this Court says is not open to controversy. Hence as the state law is clear and certain as to the ten years limitations in its Courts, on the commencement of actions therein on all U. S. Court Judgments, the said law of Congress made it imparative upon the U. S. Circuit Court for the Western District of Wisconsin, to render in this case the identical judgment now
12 brought here for review.

VIII.

But to maintain his action Plaintiff in Error cites Chap 14 of the Session Laws of Wis. of 1866, and Chapter 11 of the Session Laws of 1868, relating to the issue of executions on State Court Judgments, which is only a modification of the statute on that subject which then existed when said statute of limitations of 1858 went into effect, and is no change of principle. (See Exhibit A., B. and C. at end of Brief. Both of
13. these Session Laws were repealed in 1878 by Chapter 205, R. S. Wis. and section 2968 R. S. of 1878, enacted in their stead. (Exhibit D.) No execution was ever issued or attempted pursuant to either or both of the said Session Laws or R. S. of 1878. They have nothing to say about the commencement of actions. They do not in any way repeal, change or modify the statute of limitations, upon the commencement of actions in cases like the one at bar. It was the sovereign right of the State of Wisconsin after having given ten years time for the collection of said judgment, to pro-
14 vide that at the end of that period the doors of its Courts shall be closed against the commencement of any new suit or action thereon.

IX.

Besides, any action on said United States Circuit Court judgment, being barred by the lapse of ten years and more, after its rendition, Plaintiff in Error cannot claim with any legal propriety, that it "remains unsatisfied and due." "The lapse of the time limited by such statutes, not only bars the remedy, but extinguishes the right, and vests a perfect title in the adverse holder." Leffingwell vs. Warren, 2d Black 599
15. p. 605. If Plaintiff in Error's right in the judgment had become extinguished, at the end of the ten years limited for that purpose, then under neither of said two Wisconsin Session Laws, would said Plaintiff in Error have been entitled to an execution, if he had sought one. For there was nothing due on the extinguished judgment.

X.

The bar of the statutes of limitations on judgments at common law also rests upon the presumption of payment after the lapse of twenty (20) years. If the
16. statute lessens the period, then when the lessened period of the statute of limitations has expired, the statute bar will have the same legal effect as the common law bar. In the well considered case of McElmoyle vs. Cohen 13th Peters 312 at page 327, this Court by Wayne J., says: "The time after which suits or actions shall be barred, has been from a remote antiquity fixed by every nation, in virtue of that sovereignty by which it exercises, ~~is~~ its legislation for all persons and property within its jurisdiction.
17. This being the foundation of the right to pass statutes of prescription or limitation, may not our states, under our system, exercise this right in virtue of their sovereignty? Or is it to be conceded to them in every other particular than that of barring the remedy upon judgments of other states by the lapse of time? The States use this right upon judgments rendered in their own courts, and the Common Law raises the presumption of a payment of a judgment after the lapse
18. of twenty years. May they not then limit the time for remedies upon the judgments of other

States and alter the Common Law by fixing a less or larger time for such presumption, and altogether barring suits upon such judgments if they shall not be brought within the time stated in the statute? It certainly will not be contended that judgment creditors of other states shall be put upon a better footing in regard to a State's rights to legislate in this particular, than the judgment creditors of the State in
19. which the judgment was obtained, and if this right so exists, may it not be exercised by States restraining the remedy upon the judgment of another State, leaving those of its own Courts unaffected by a statute of limitations, but subject to the Common Law presumption of payment after the lapse of 20 years. In other words: May not the law of the State fix different times for barring the remedy in a suit upon a judgment of another State, and for those of
20. its own tribunals? We use this mode of argument to show the unreasonableness of a contrary doctrine."

XI.

The above authority applies to judgments of other States, than the one in which the action is brought, as to which there are constitutional restrictions, in their favor, which have to be observed. But there are no such constitutional restrictions as to United States Circuit Court judgments.

21. The Said section sixteen (16), of Chapter one hundred and thirty-eight (138) of the Revised Statutes of Wisconsin of 1858, which limits the time for the commencement of actions, on United States Court judgments, to ten years from the time of their rendition, up to 1878 had never been repealed, changed or modified.

The part of Chapter 138 of the Revised Statutes of Wisconsin of 1858 which applies to the case at bar, reads as follows, to-wit:

22. "Section 1. Civil actions can only be commenced within the periods prescribed in this Chapter, except when in special cases a different limitation is

prescribed by statute. But the objection that the action was not commenced within the time limited, can only be taken by answer."

Then, after providing for 14 cases by as many different sections, Section 15 provides that the time limited for the commencement of actions upon judgments of Courts of Record of this State (Wisconsin) shall be "twenty years," or the same as at Common Law. Then follows the first clause of said Section 16.

"Section 16. Within ten years:

1. An action upon a judgment or decree of any Court of record of any State or territory within the United States, or of any Court of the United States"

This ten years statute of limitations for the commencement of actions on all United States Court judgments, was in force without any change whatever, from the time when the Revised Statutes of Wisconsin, of 1858, were enacted, until they were superceded by the Revised Statutes of Wisconsin of 1878, twenty years afterwards.

The judgment upon which Plaintiff in Error brought his action herein having been recovered in the Circuit Court of Wisconsin, on the 8th day of May, 1866, this new action on this judgment became barred, at the end of the 8th day of May, 1876, or in ten years after its rendition. It was the sovereign right of the State of Wisconsin after giving ten years in which to enforce said judgment to provide, as it did, that then, at the expiration of ten years thereafter, the doors of its Courts shall be closed against the prosecution of any new action thereon.

As we have shown above, the Plaintiff in Error was entitled to no execution under said two Session Laws of 1866 and 1868, or Revised Statutes of 1878, supra, after the lapse of said ten years from the time of the rendition of the said judgment, for the reasons above stated. But, even if mistaken as to this, it would make no difference, because that after the lapse of said ten years we think there can be no doubt of the sovereign

26. right of the State of Wisconsin, to close the doors of its Courts against the commencement of any new action thereon, as Plaintiff in Error has here attempted to do, as said ten years law of limitation remained unchanged for more than 12 years after the recovery of the judgment under it.

Besides the said two Session Laws of 1866 and 1868 relate to matters of practice, and the 34th Section of the Judiciary Act 1789, now being Section 721 of the United States Revised Statutes, is a part of the

27. fundamental law of the land, and in all cases of want of perfect harmony of Statutes relating to rules of practice, it being a rule of property, should prevail and sustain the judgment of the Court below, brought here for review. See Ryan vs Bindley, 1st Wallace 66.

XII.

Before the Court below, the United States Circuit Court, for the Western District of Wisconsin, had ever acquired jurisdiction of the subject matter of the action now here under review, or any federal question

28. had arisen or existed in it, (Metcalf vs. Watertown 128 United States Reports 586), the Supreme Court of Wisconsin had, in Sept. 1887, construed the Statute under inquiry, and held that said Subdivision 1 of Section 16, of Chapter 138, Revised Statutes of Wisconsin of 1858, prescribed the limitations for the commencement of actions upon judgments of Courts of the United states, after its adoption, in the Revised Statutes of 1858 down to the present Revised Statutes, 1878, and that it was valid.

29. In Waterman, Administratrix, vs. Waterloo, 69 Wisconsin 260, the full decision and opinion of the Wisconsin Supreme Court on this question is as follows.

"Waterman, Administratrix, etc., Appellant, vs. The Town of Waterloo. Respondent.

September 2—September 20, 1887.

Limitation of Actions on judgments.

For the Appellant there was a brief by Finches, Lynde

and Miller, attorneys, and E. P. Smith, of counsel, and oral argument by Mr. Smith.

For the respondent there were briefs by Hall & Skinner, attorneys, and Gregory, Bird and Gregory, of counsel, and oral argument by Daniel Hall and G. W. Bird.

The Court, "Orton, J. The first cause of action was a judgment rendered in the Circuit Court of the Unit-
30. ed States for the District of Wisconsin, in favor of Charles Howard, and against the town of Waterloo, on the 13th day of September, 1866, for $4535.01. To this cause of action the defendant plead the statute of limitations of ten years, by virtue of subdivision 1, of Section 16, of Chapter 138, Revised Statutes 1858. The said Howard died in 1883, and the plaintiff was appointed administratrix with the will annexed, and copies of the will and letters were
31. filed in Milwaukee County in August 1886, and this action was commenced on the 26th day of August, 1886. The Circuit Court found that said first cause of action was barred by said ten years statute of limitations of 1858 and judgment was rendered thereon in favor of the defendant. On this appeal from said judgment, the only question is whether said ten years statutes applied to said first cause of action or said judgment, rendered in the Circuit Court of the United States for the District of Wisconsin, on the 13th
32. day of September, 1866.

This is a new question in this Court, but we do not think that there is the least possible doubt about the construction of this statute; indeed, the language is too plain and explicit to admit of construction. It has but one meaning. Section 16, Chapter 138, Revised Statutes 1858. "Within ten years (1.) An action upon a judgment or decree of any Court of record of any state or territory, within the United States,
33. or of any Court of the United States." This cause of action is a judgment of a Court of the United States, and therefore within the very language of this statute, and barred by it. Previous to this stat-

ute the judgments of all Courts of record were barred in twenty years. In 1858 the legislature saw fit to bar all judgments or decrees of State Courts other than those of this state, and of all territorial Courts, and of any Court of the United States, in ten years, and leave the twenty years limitation upon a judgment or
34. decree of any Court of record of this state as in Section 15.

In the revision of 1878, in Section 4220, the judgments or decrees of United States Courts, sitting within this state, were placed, with judgments and decrees of the Courts of record of this state, under a bar of twenty years, and the revisors say in their note to said section: "Judgments of United States Courts in this state are put on the same footing as domestic judgments, as manifestly proper." Who put them
35. on the same footing, and when were they put on the same footing as domestic judgments? Why, the revisors, and by the revision, as a matter of course. Most certainly the history of this legislation, and the changes manifestly made, do not cast any doubt upon the plain and obvious meaning of this language. Any argument of construction based upon this language might imply a doubt where none can exist. Similar language in the state insolvent law of Minnesota, in Simon vs. Mann, 33 Minnesota, 413, was held to
36. include the Circuit Court of the United States, for the district of Minnesota, but only "in view of the scope and practice of the insolvent law." That the Circuit Courts of the United States are properly called domestic Courts of the state wherein they are held, could not possibly change the meaning of this language, "or of any Court of the United States," without destroying it entirely. What other United States Courts, except the District and Circuit Courts of the United States, render judgments upon which the
37. statute of limitations can run. The revisors seemed to think that they had put the judgments of these Courts upon the footing of domestic judgments by an amendment in the revision; not to

make them domestic, but, "to put them on the same footing" under the limitation law. The authorities cited by the learned counsel of the appellant have no possible application or effect to cast a doubt on this plain language of the statute. It has been very properly changed in the revision of 1878, but we must ad-
38. minister the law applicable to this case as we find it.

By the Court. The judgment of the Circuit Court is affirmed."

XIII.

In support of the foregoing view, we cite a few decisions of this Court as follows:

Section 34 of the Judiciary Act of 1789—identical with Section 721 of the United States Revised Statutes is construed in Swift vs. Tyson 16 Peters 1, and
39. on the 18th page, this Court say:

"In all the various cases which have hitherto come before us for decision, this Court have uniformly supposed that the true interpretation of the 34th Section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals."

In Lane vs. Vick, 3 Howard 464 at page 476, this Court also say:

"With the greatest respect it may be proper to
40. say that this Court do not follow the State Courts in their construction of a will or any other instrument as they do in the construction of statutes." "The construction of a statute by the Supreme Court of the state is followed without reference to the interests it may affect, or the parties to the suit in which its construction is involved."

"In Carroll vs. Safford 3, Howard 441, page 460, this Court also say:

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41. haps the best evidence of the intention of the law makers. The Courts of the United States

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"In Carroll vs. Safford 3, Howard 441, page 460, this Court also say:

"The practical construction of local laws is perhaps the best evidence of the intention of the law-makers. The Courts of the United States adopt as a rule of decision the adopted construction of local laws. And it cannot be material whether such

construction has been established by long usage or a judicial decision" This is said in holding valid a law of Michigan taxing unpatented lands.

In McCluny vs. Stillman 3, Peters 270, at page 277, this Court also say referring to said Section 34—"Under this statute, the acts of limitation of the
43. several states, where no special provision has been made by Congress, form a rule of decision in the Courts of the United States, and the same effect is given to them as is given in the State Courts."

This Court in Burton vs. Koskonong, 104 U. S. R., 668, at page 670-1, have construed our Wisconsin statutes of limitations to be as we claim them to be, and say: "The revision of 1849 was superseded by one made in 1858 which went into operation on the first day of January, 1859. By the latter as modified by an
43. act passed in 1861, civil actions other than for the recovery of real property were required to be commenced within the following periods: Actions upon judgments or decrees of Courts of record of the state, and actions upon sealed instruments, when the cause of action accrued in the state, within twenty years. (Revised Statutes Wisconsin, 1858, Chapter 138, Section 15), Actions upon the judgments or decrees of Courts of record of any state or territory of the United States, or of Courts of the United States, and
44. actions upon sealed instruments, when the cause of action accrued out of the state, within ten years. (Section 16). And actions upon contracts, obligations or liabilities express or implied, excepting those mentioned in Section 15 and 16, within six years, the time to be computed in each case from the date when the cause of action accrued. (General Law of Wisconsin, 1861, page 302).

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The limitation of actions on Municipal
ends + Coupons in Wis. is six years
of 20 years. Koshkonong vs Burton
4 U.S.R. 668.

EXHIBITS.

Chapter 134 of Revised Statutes, 1858, of Wisconsin, "of Executions and Proceedings supplementary thereto."

"Section 1. The party in whose favor judgment has been heretofore or shall hereafter be given, may at any time within two years after the entry of judgment, proceed to enforce the same, as prescribed by this title.

"Section 2. After the lapse of two years from the entry of judgment, an execution can be issued only by Exhibit A. the leave of the Court, upon motion, with personal notice to the adverse party, unless he be absent or non-resident; or cannot be found to make such service, in which case such service may be made by publication, or in such other manner as the Court shall direct. Such leave shall not be given unless it be established by the oath of the party, or other satisfactory proof, that the judgment or some part thereof remains unsatisfied and due. When the judgment shall have been rendered in a Court of justice of the peace, and docketed in the office of the clerk of the Circuit Court, the application for leave to issue execution must be to the Court where judgment is docketed."

Chapter 14 of General laws of Wisconsin of 1866. "Section 1. Upon any judgment which has heretofore been or may hereafter be rendered or docketed in any Court of record in this state, execution may be issued at any time within five years after the rendition or Exhibit B. docketing thereof, and alias executions may be issued thereon at any time thereafter. But in cases where no execution has been issued within said five years, execution shall only be issued upon leave granted by the Court, or a judge thereof, or a County judge, or a Court commissioner; and such leave shall not be granted by any such Court or officer unless it appear to his satisfaction, by the affidavit of the party, his agent or attorney, that the judgment or some part thereof, remains unsatisfied and due.

The foregoing Section is amended by Section 1, Chapter 11, of General Laws of Wisconsin, 1868, by Exhibit C. adding thereto the words "provided, that no execution shall issue, nor any actions or proceedings be had upon any such judgment after twenty years
49. from the time of the rendition or docketing thereof."

All the above Wisconsin statutes were superceded by Section 2968 of the Wisconsin Revised Statutes of 1878, which is the present law of that state and reads as follows:

"Section 2968. Upon any judgment which shall have been docketed in any Court of record, execution may be issued at any time within five years after the rendition thereof, and when any execution shall have been so issued and returned unsatisfied in whole or in part, alias executions may be issued thereon at any time thereafter. But if no execution shall have been issued Exhibit D. thereon, within said five years, it shall only be issued thereafter upon leave granted by the Court, or a judge thereof, when it shall be made satisfactorily to appear by the affidavits of the party, his
50. agent, or attorney, that the judgment or some part thereof remains unsatisfied and due; but in no case shall an execution be issued, or any proceedings had upon any judgment, after twenty years from the time of the rendition thereof."

XIV.

A glance at the foregoing exhibits, will show that the two General Session Laws of Wisconsin, of 1866 and 1868, cited by Plaintiff in Error, have nothing whatever to do with the issues of the case at bar.

The limitations of 20 years for the commencement of actions on State Court judgments of record, Section 15, of Chapter 138, Revised Statutes of 1858, and of 10 years, on United States Court judgments, Section 16 of same Chapter, remained unchanged dur-
51. ing the 20 years from 1858 to 1878.

The broad language "upon any judgment which has heretofore been, or may hereafter be, rendered or docketed, in any Court of record in this State," etc., of Chapter 14, of said General Laws of 1866. "Exhibit B," does not effect, or relate to anything, but the issue of executions on State Court judgments. No State law can of itself confer power on a United States Court to issue executions. The United States Courts must derive not only their power to issue executions, but all their powers, from congress which created them.

Said Chapter 14, with the unnecessary, but ex-
52. press limitation of the proviso to 20 years for executions, annexed to it by said General law of 1868, "Exhibit C," so far from working, or effecting, any change in said 20 years statute of limitations, on State Court judgments, to which it solely relates, is in entire harmony with it.

We speak of said proviso, or limitation, of said General law of 1868 as "unnecessary" for the reason that said sections 15 and 16 of Chapter 138 of Revised Statutes of 1858 control the whole matter. For behind every valid execution must stand a good and operative judgment. Whenever the judgment falls,
53. by its being paid, or becoming barred by the Statute of limitations, or other cause, the execution inevitably falls with it.

Since said 20 years statute of limitations on State Court judgments of record and of 10 years on United

States Court judgments, were and remained the unchanged laws of Wisconsin for the 20 years from 1858 to 1878, which said state had the sovereign power to enact and enforce, in her own domestic affairs, in all her Courts; said 10 years Statute of limitations for the commencement of action on United States Court judgments, is not only the law to be enforced in all the State Courts of Wisconsin, but also under the 34th Section of the United States Judiciary Act of 1789, the same
54 law and rule of decision is also to be enforced in all United States Courts. Hence the judgment of the Court below should be affirmed; else the rule of property, here, in State and Federal Courts, would not be uniform in common law actions.

Said 34th Section of the Judiciary Act of 1789 (now Sec 721 of United States Revised Statutes) relates solely to the formation of judgments, and not to carrying judgments into executions. Wyman vs. Southard 10 Wh. 1, p 24-5.

Besides Mandamus, and not execution, is the remedy against said city. Rees vs. The City of Watertown, 19 Wallace 107.

DANIEL HALL,
GEO. W. BIRD,
Attorneys for Deft. in Error.

18

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Supreme Court of the United States.

OCTOBER TERM, 1892.—No. 84.

ELIAB W. METCALF, PLAINTIFF IN ERROR.

vs.

THE CITY OF WATERTOWN.

PLAINTIFF'S BRIEF IN REPLY.

I.

Counsel for defendant contend that the language of Chapter 138, Wis. Rev. Stat. 1858, is such as to show that the Legislature's attention had been specially directed to the two classes of courts as distinct, and that, with this distinction in mind, it intentionally discriminated between them. Upon this point we make the following observations:

(1). There is nothing in the language of section 15 to support counsel's contention. The words "*any court of record* of this state," do not suggest any restriction. The expression is not one which would have been used if the Legislature had there intended to emphasize the distinction between the state and federal courts of Wisconsin.

(2). Where the Legislature has wished to mark the distinction between the two classes of courts it has taken pains to do so in language very different from that just quoted, and of a sort which could not possibly be

misunderstood. In the very same body of laws of which chapter 138 forms a part we find provisions authorizing an action for damages to be brought by the personal representative of any person whose death may result from injuries caused by the wrongful act, neglect, or default of another, with these restrictions: "*Provided*, That such action shall be brought for a death caused in this state and in some court *established by the constitution and laws of the same.*"

Wis. Rev. Stat. 1858, ch. 135, sections 12 & 13.
C. & N. W. R'y Co. *vs.* Whitton, 13 Wall. 270.

Why was not the Legislature in this case satisfied with some expression like this: "In some court of this state?" Because its attention had in this instance been directed to the United States courts in Wisconsin, and it wished to use language which would plainly exclude them. Of course, it was held that the jurisdiction of the federal courts could not be restricted by such legislation; but there was no room for doubt as to the intention of the Legislature.

(3). The language of section 16 is not sufficient evidence of a deliberate intention to mark a distinction between state and federal courts of the sort supposed by counsel, or to discriminate between them. It is so general that, upon any interpretation, it conflicts with the provisions of section 15, and shows that the careful attention of the Legislature could never have been directed to it—unless it supposed that in the last clause of the second half of this section, and in the corresponding portion of the 15th section, it had made its meaning sufficiently clear. Looking at this clause we see where the attention of the legislature was particularly directed, and that the only discrimination intended was a territorial one.

(4.) The corresponding sections of the revision of 1878 support this view. They retain the provisions respecting

the locality of the cause of action and make only such verbal alterations as negative the intention of discriminating between the two classes of courts. They insert the word "other" before the words "state or territory"—a change which cannot by any stretch of imagination be regarded as making any change in the law; and then, with the same purpose of removing every ambiguity, they add the words "sitting without this state" to the words "court of the United States," in section 16, and in section 15 add the words "or of the United States sitting within this state." This was after the decision in the case of Cole *vs.* Weil (cited on p. 16 of our main brief), where the defendant had sought to take advantage of the ambiguity of the law and the court had rejected the defense. That was the first time the attention of the Legislature had been directed to the distinction between state and federal judgments in connection with the limitation laws; and its attention having been directed to the subject it took pains to repudiate any intention of discriminating between them. There is every reason to believe that it would have done the same thing in 1858 if its attention had then been directed to the subject.

(5.) The contention of defendant is strongly negatived by the later acts of 1866 and 1868, referred to in our main brief. These began by regulating the issue of executions upon "any judgment rendered in *any court of record in this state*," and ended by providing that no execution should issue "*nor any action* or procedings be had upon *any such judgment after twenty years.*" This language gives no indication of a desire to discriminate between the state and federal courts, on the contrary, it is totally inconsistent with such an intention, and shows conclusively, as we think, that the mind of the Legisiature had never been directed to the subject in the way supposed by counsel. The same provisions, "rewritten, but not materially changed," are incorporated in the revision of 1878; only

the words "nor any action," are left out, "this subject being covered by the chapter on limitations."

R. S., 1878, § 2968; and Revisers' note thereto

II.

There is a disagreement between the counsel for defendant as to the effect of these acts of 1866 and 1868, growing out of a still more serious disagreement as to the nature of a statute of limitations.

We have called attention to the fact that the acts of 1866 and 1868 permit the issue of executions upon federal as well as state judgments for twenty years after their rendition; and we have argued from this that the legislature could not have intended to limit the bringing of actions within a shorter period.

One of the learned counsel for defendant admits that executions may issue under these acts for as long a time upon federal judgments as upon state judgments; but he denies the correctness of our conclusion as to the time for bringing actions. In support of this position he contends that the law limiting the time for bringing actions affects only that particular remedy, and leaves other remedies to the operation of other laws. He admits, also, that the state limitation law does not have or profess to have any force or effect in itself to control or limit any of the remedies which may be asserted in the court where the judgment was recovered. This is in the line of the decision in the case of McElmoyle *vs.* Cohen, where it was held that an act limiting actions on foreign judgments affected simply the remedies which could be sought in the courts of the state where the act was in force; that the judgment in such cases was not extinguished or denied, and that the rights of the judgment creditor and the remedies to which he was entitled in the court which rendered the judgment remained absolutely untouched. This position also finds support in a more recent case in this court

which holds that limitation laws affect the remedy only, and that the state may restore the remedy even after the right of action has already been cut off by the bar of a previous statute of limitations.

Campbell *vs.* Holt, 115 U. S. 620.

But if counsel is right in this—if it is not the intention or effect of the state law, of itself, to cut off any remedy but the particular remedy of an action in the state courts, what reason is there for contending that the remedy by action in the federal court is cut off so long as the remedy by execution in the federal court remains? In the state courts, upon their own judgments, the right of action remains as long as the right to execution. Why does not this rule apply in the federal courts? It seems to us that the admission made by counsel strengthens the argument on pp. 39 and 40 of our main brief as to the inapplicability of the ten-year limitation law as a defense in this action, as well as our argument upon the interpretation of the law.

But the other of defendant's counsel takes issue with his associate on this question. He quotes the language of this court in the case of Leffingwell *vs.* Warren, and draws from that the conclusion that the judgments even of the federal courts, with all the rights of the judgment creditor growing out of them are absolutely extinguished at the end of ten years by the sole virtue of the state law; and being so extinguished, no remedy whatever remains, either by action or execution, in either the state or federal courts.

Counsel is not sustained in this position by the case which he cites, nor by the case of McElmoyle *vs.* Cohen, which he also cites, but which, as we have just shown, is based on entirely different principles. He seems to be supported, however, by the decisions of the Wisconsin Supreme Court, referred to on p. 34 of our main brief.

But if he is right in regard to the nature of the limitation law—if the law by its own force extinguishes the judgment, so that nothing remains, and neither action nor execution can be had upon it—what becomes of the plea that the law does not directly affect the judgments of the federal courts and the rights of suitors in those courts; or the plea that it merely lays down a rule for the government of the courts which have been created by the state?

Such a law is not within the power of the state to pass. It has no validity in itself, and is not made valid by the act of Congress.

III.

Counsel argue that a judgment is simply and solely an evidence of a debt, which existed before the judgment was rendered and is not changed in character by the judgment.

It does not seem to us that this is a satisfactory statement of the nature of a judgment.

A judgment is an evidence of a debt; but it involves much more than that. There are, in addition, certain important rights, or incidents, call them what you will, connected with or attached to a judgment which are left wholly out of sight by this definition. Whether these rights, or incidents, are created or conferred by the judgment, or by the court rendering the judgment, or by the general law, is not important for our present purpose, so long as they are not ignored. The more important of these rights, or incidents, under the laws of Wisconsin—leaving out of consideration for the present the judgments of the federal courts—are the following: In cases of torts the judgment creates a debt where there was no debt before; in cases growing out of contract the judgment liquidates what was before unliquidated; to claims bearing interest interest is added; the costs and expenses of the action are added also; and the debt "evidenced" by

the judgment is for a different sum than the original demand. Upon this sum interest runs, although before judgment no interest may have been collectible; the judgment becomes a lien upon the real estate of the judgment debtor for ten years, is enforceable by execution for twenty years, and may be made the ground of a new action for the same period. The old claim, whether upon tort or contract, whether liquidated or unliquidated, becomes merged in the judgment and thereby receives a new lease of life, dating from a new date, and running in every case beyond the period of the life of the original claim.

These are some of the incidents which, under the laws of the state, attach to the judgments of the state courts.

Now when we come to consider what are the rights, or incidents, which attach to the judgments of the federal courts we must look to the constitution and acts of Congress for the answer. As to many of them no different rule has been prescribed from that which prevails under the state law. In other cases Congress has at different times laid down a different rule. But in no case has it been left to the power of the states to determine whether the rights or incidents connected with federal judgments shall be the same as, or different from, those connected with state judgments. Wherever Congress has enacted special laws upon any of these matters its laws of course control. Where it has failed to pass such laws it has intimated very plainly that the rights or incidents attaching to federal judgments shall be the same as are attached to the judgments of the state courts under the laws of each state. This is in substance what we have already attempted to point out in that portion of our argument found on pages 24 to 26 of our main brief.

But let us suppose that counsel are right in their definition—that a judgment is nothing but the evidence of a demand whose character remains unchanged, being the

same after as before judgment—then we have, under their interpretation of the statute of limitations, a discrimination which is not in any respect based upon the character, or nature, or origin of the claim, nor upon the character or nature of the evidence by which it is supported. The evidence is of precisely the same character in either case, is equally authoritative, and equally conclusive. What reason is there for the discrimination? What motive is there, except to place suitors in the federal courts in a less advantageous position than suitors in the state courts? How can we suppose the Legislature intended such a discrimination? Or how can it be supported under the constitution and laws of the United States?

IV.

This leads us to notice one more point made by counsel, which is, in substance, that citizens of Wisconsin may also under certain circumstances recover judgments in the United States courts in Wisconsin, against citizens of other states, and as these also are barred in ten years there is nothing in the state law which can be said to discriminate in favor of citizens of Wisconsin as against citizens of other states.

This answer does not meet the objections we have made to the law, for several reasons.

In the first place our objection is based on the fact that in a large number of cases, constituting the bulk of litigation in the circuit courts, the jurisdiction of the federal courts is concurrent with that of the state courts. Under the constitution this jurisdiction may at any time be extended to include all controversies between citizens of different states. It has been held that the states, under these circumstances, have no power to enact laws which would place suitors in the federal courts in a worse position than suitors in the state

courts. In view of this it does not seem an entirely satisfactory defense of the Wisconsin law to say that citizens of Wisconsin, as well as citizens of other states, are made to suffer from its operation when they are so unfortunate as to be parties to actions in the federal courts. A discrimination which accomplishes such a result is opposed to the evident purpose of Congress.

Again, the cases in which judgments in the federal courts in Wisconsin are recovered by citizens of Wisconsin against citizens of other states are few and exceptional. A creditor is never obliged to take into the federal courts of the state of which he is himself an inhabitant a claim against a citizen of another state, because that is not the natural forum for the assertion of such claims. The ordinary place for asserting a claim is at the home of the debtor. By doing this—as in the majority of cases they must do—citizens of Wisconsin may always escape the operation of the Wisconsin law.

But a non-resident of Wisconsin having a right of action against a citizen of Wisconsin naturally seeks him in that state. He is given there his choice of courts. If he sues in the state court he may be exposed to unfriendly influences which may make it difficult for him to obtain justice. If he elects to sue in the federal court he is at this disadvantage, that any judgment he may recover there will be less valuable than the judgment he would be entitled to recover in the state court. Even this is not all. Where the jurisdiction authorized by the constitution to be conferred upon the federal courts has been sufficiently extended by Congress (as was done by the Act of 1875) he may be deprived of the privilege of suing in the state court, if he should elect to do so, and be forced into a federal court, even against his will, by a resident defendant who realizes that a federal judgment against himself will be less of a burden than one in the state court.

The right to resort to the federal courts was given for

the purpose of additional protection to the rights guaranteed by the Constitution to citizens of other states. The state imposes a penalty for asserting this right. The federal courts were given jurisdiction in these cases in order that citizens of other states might obtain from them the same relief which they would have a right to demand from the state courts; and the state law makes this impossible.

It seems to us that counsel have not disposed of this argument.

Respectfully submitted,

CHARLES E. MONROE,

Attorney for Plaintiff in Error.

Supreme Court of the United States.

JAMES H. McKENNEY, CLERK.

OCTOBER TERM, 1893.

No. 18.

ELIAB W. METCALF, Plaintiff in Error,

vs.

THE CITY OF WATERTOWN, Defendant in Error.

Supplemental Brief of Defendant in Error.

ON RE-ARGUMENT.

GEO. W. BIRD,
DANIEL HALL, } *Attorneys for Defendant in Error.*

SUPREME COURT of the UNITED STATES.

ELIAB W. METCALF, Plaintiff in Error,

vs.

THE CITY OF WATERTOWN, Deft. in Error.

SUPPLEMENTAL BRIEF ON THE RE-ARGUMENT.

I.

On the question as to the construction or meaning of the Wisconsin statute of limitations upon United States Court Judgments, to which Plaintiff in Error devotes so much space, we shall waste no time further than to say, that in Koshkonong vs Burton, 104 U. S. R, 668, at p 670-1, this Court say of the Wis. statute of limitations, by Harlan, J.: It "required" "actions upon jndgments or decrees of courts of record of the state" "to be commenced" "within twenty years", and "actions upon judgments or decrees" "of courts of the United States" "within ten years" from their dates

On the appeal of Waterman vs. Waterloo to the Supreme Court of Wisconsin, on this precise question, 69 Wis. 260-1, that Court says of it: This is a new question in this court, but we do not think that there

is the least doubt about the construction of this statute; indeed, the language is too plain and explicit to admit of construction. It has but one meaning; Section 16, chapter 138, "within ten years" "an action upon a judgment or decree of any court of record of any state or territory, within the United States, or of any court of the United States." "This cause of action is a judgment of a court of the United States, and therefore within the very language of this statute and barred by it"

The fact is, the language of the statute is too plain to be misunderstood. No master of the English language could have expressed the limitation of ten years on United States Court judgments more clearly than said statute does.

The decision of this matter does not turn on the question as to whether a judgment of the United States Circuit Court of the district of Wisconsin is a domestic judgment of Wisconsin, or not. It is sufficient that the cause of action is correctly described by the statute and barred by it.

This whole subject as to the meaning of said law is fully discussed in the first part of our main brief. But we have no idea that this court has ordered this re-hearing upon any question as to the meaning of said law. That meaning is self-evident.

But Plaintiff claims that one of Defendant's counsel "admits that executions may issue under" the Wisconsin Session Laws of 1866 and 1868, "for as long a time upon federal judgments as upon state judgments." This is a mistake. No such admission is made by either of Defendant's counsel. Those acts modify the practice of state courts alone. The state legislature could not authorize the lengthening of the time to issue execution from a United States Court. If so, it could shorten that time, and thus control its proceedings. (Ableman vs. Booth, and United States vs. Booth-21 How. 506. Tarble's Case, 13 Wal. 397.) These two statutes in no way change, or affect, or modify the said

ten years' limitation of the statute upon the commencement of actions on United States Court judgments.

But Plaintiff in order to support his contention as to said two session laws, cites the case of Ross vs. Duval, 13 Pet. 45, and the following extract from p. 61 of that case, at p. 9 of his main brief, to-wit: 'Why does not this statute apply to the federal courts? It limits actions and executions on judgments rendered in the state courts, and the same rule must be applicable to judgments obtained in the Courts of the United States.' The case of Ross vs. Duval arose under a *ten* years' statute of limitations of the state of Virginia, whose purpose and language was very unlike that of said Wisconsin two session laws.

This court say on p. 58 of that case: "In 1792 the state of Virginia passed a statute providing that 'judgments in any court of record within the commonwealth, where execution hath not issued, may be revived by *Scire facias*, or an action of debt brought thereon, within ten years after the date of such judgment, and not after; or where execution hath issued, and no return is made thereon, the party in whose favor the same was issued, shall and may obtain other executions, or move against any sheriff or other officer, etc , for the term of 10 years from the date of such judgment, and not after.' "

The question then in this Virginia case was, as to whether said act, which barred the action and took away all the remedies for collection of judgments at the end of ten years from their dates, was a statute of limitations which prevented further proceedings to recover the judgment after the lapse of the ten years after its rendition. Held that it was the statute of limitations of Virginia—the only statute on such a judgment, or claim; and hence that under said Sec. 34 of the Judiciary Act of 1789, it was applicable to the decisions and judgments of the courts of the United States.

Therefore, as by the plain terms of the Wisconsin statute, and the unanimous decision of the full bench of its Supreme Court, actions on United States court

judgments, brought in its state courts, are barred at the expiration of ten years after their rendition, the same rule under said Section 34 of said act of Congress of 1789, would bar the action in issue here, and affirm in this court the decision of the court below.

In Bank of Alabama vs. Dalton, 9 How. 522, at p 527, this court per Catron, J., decide and say: "That acts of limitation furnish rules of decision, and are equally binding on the federal courts, as they are on state courts, is not open to controversy; the question presented is one of legislative power, and not practice."

III.

The statutes of limitation of the several states are all of them strictly local laws of such states, and have always been so held by this court during the entire period of its existence.

Hence the ten years' statute of limitations of the State of Wisconsin on United States court judgments is part of the local statute law of that state. And the interpretation within said state of said local law, as by said unanimous decision of the full bench of the Wisconsin Supreme Court in Waterman vs. Waterloo, *supra*, becomes a part of that law as if incorporated in it by the legislature. Christy vs. Pridgeon, 4 Wal. 196.

IV.

It is immaterial which court, state or federal, first acquires jurisdiction of the question, the construction of this local law by the state court of Wisconsin is binding on this court.

In Leffingwell vs. Warren, 2 Black 599, at p. 603, on this point, this court, by Swayne, J., decide and say: "The courts of the United States, in the absence of legislation on the subject by congress, recognize the statutes of limitations of the several states and give them *the same construction and effect which are given them by the local tribunals.* They are a rule of decision under the 34th Section of the Judicial Act of 1789.

The construction given to a statute of a state by the highest judicial tribunal of such state, is regarded

as a part of the statute, and is as binding on the courts of the United States as the text. Shelby vs. Guy (11 Wheat. 361), McCluny vs. Silliman (3 Pet. 276), Greene vs. Niel's lessee (6 Pet. 291), Ross vs. Duval (13 Pet. 45), Massingal vs. Downs (7 How. 760), Van Renselaer vs. Kearney (11 How. 297), Webster vs. Cooper (14 How. 496).

If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudication. United States vs. Morrison, (4 Pet 124), Green vs. McNeil (6 Pet. 291)."

V.

The mistake of Plaintiff in Error consists largely in his ascribing to said Act of the Wisconsin Legislature, not only the effect which it of itself produces, but also the combined effect of that act and of said 34th Section of the Judiciary Act of 1789, and attempting to make said state responsible for the legitimate effects produced solely by said Act of Congress. This is obvious from his argument against the validity of said ten years' statute of limitation, commencing at letter "B" on p. 20, and extending to p. 41 of his main brief, and by nearly all the cases he there cites, which fall within the exceptions of said Section 34—decisions against acts in conflict with the constitution and laws of the United States, cases which have nothing to do with the questions in issue here.

Said state law of limitations is no "attempt to define the powers of the federal courts."

It does not "attempt to limit" or "define any rights of persons conferred by the federal government." It says nothing on either subject.

VI.

To test said Wisconsin ten years' statute of limitations on United States court judgments, it is essential to consider what would have been its effect, if said Section 34 of said Act of Congress had never been enacted.

1st. Were it not for said Section 34, said Wis-

consin ten years' statute of limitations would have no effect whatever on the issue of the case at bar.

2d. The only effect in such case, said Wisconsin law of limitations could have, is, that if any owner of a judgment rendered by a United States court in the state of Wisconsin, should sue it over in a court of that state, the commencement of such new action would be barred at the expiration of ten years from the date of the judgment upon which the action is brought, whether the same is brought by a citizen of the state of Wisconsin, or a citizen of any other of the United States. All would be served alike under this Wisconsin law. It is impartial—a local law of the state, relating solely to her own domestic affairs and within her sovereign power to enact, and affecting no one's interests, except those of citizens of the state of Wisconsin, and of those persons, and citizens of other states, who voluntarily seek and submit to the jurisdiction of her courts.

VII.

"The powers not delegated to the United States, by the constitution, nor prohibited to the states, are reserved to the states respectively, or to the people" 10th Amendment to the U. S. Constitution.

The original right of the states to pass laws of limitations, making discriminations according to their pleasure, is not delegated to the United States, nor prohibited to the states.

"That the authority" to pass such laws "lies within the scope of that immense mass of undelegated powers which are reserved to the states respectively, we think too clear to admit of doubt." Conway vs. Taylor, 1 Black 603, p. 635. The right to pass such laws is especially clear where, as here, they conflict with no law of Congress.

In Tioga R. R. vs. Blosburg & C. R. R., 20 Wal. 137, at p. 150, per Hunt, J., this court say: "Statutes of limitation are in their nature arbitrary. They rest on no other foundation than the judgment of a state as to what will promote the interests of its citizens. Each

determines such limits, and imposes such restraints, as it thinks proper." Hence there is no pretext for saying that the legislature cannot discriminate between different classes of judgments.

The effect in United States courts of said Wisconsin ten years statute of limitations on the commencement of actions on United States court judgments, is entirely due to said Section 34 of said Judiciary Act of Congress of 1789, and re-enacted as Section 721 of the United States Revised Statutes. Hence said Wisconsin law of limitations is, and has also become, with all its discriminations, the law of the United States for all its courts, as well as the law of Wisconsin, with all the sanction which the state legislature and Congress could give it.

Of said Section 34, in Wayman vs. Southard, 10 Wh. p. 48, this Court, by Marshall, C. J., hold and say, that "this section is undoubtedly prospective, as well as retrospective. It regards future, as well as existing laws."

For ten years after its rendition, a state court judgment is a lien on Defendant's unexempt real estate in the county where it is docketed. Section 2902 Wisconsin R. S. The said ten years statute of limitation does not in the least interfere with the ten years' lien of a federal court judgment on Defendant's realty throughout the district in which the court is located.

VIII.

This action was first tried in the court below before Judge Bunn, and afterwards on Plaintiff's application, his judgment for Defendant was reviewed before the full bench of the United States Circuit Court, Judge Gresham presiding, who said, in affirming the judgment before rendered, when the same appeal was made to him as is now made here, against discriminating against a United States court judgment, that, since congress had not seen fit to intervene, he did not see how a court could do it.

In this he struck the true key-note to the proper solution of the question in issue here. If any restriction was to be put upon the application of said Wisconsin state law of limitations to said federal court judgments, it would have to be made by Act of Congress, regulating the statutes of limitations of the courts of its own creation in said state of Wisconsin. The remedy, if any need be, must be legislative—not judicial.

IX.

But congress, so far from taking or making any exceptions to this Wisconsin ten years' statute of limitations, directly adopted and confirmed said law by said Section 34 of the Judiciary Act of 1789, which enacts that, "The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." With the exception therein stated, this Act of Congress applies to all state local laws which are pertinent to the issue. And it especially applies to state statute of limitations. Bank of Alabama vs. Dalton, 9 How, 527, *supra*. There is no pretext for saying that said Wisconsin statute of limitations is in conflict with the constitution, treaties, or laws, of the United States."

So far from repealing, or modifying said United States law as to Wisconsin, Congress not long since re-enacted it as Section 721 of the U. S. R. S.

In McCluny vs. Silliman, 3 Pet. 270, at p. 277, this court decide and say, referring to said Section 34: "Under this statute, the acts of limitation of the several states, where no special provision has been made by congress, form a rule of decision in the courts of the United States, and *the same effect is given to them, as is given in the state courts.*"

X.

This Wisconsin ten years statute of limitation in no way abridges the privileges or immunities of citizens of the United States, nor produces or causes any

inequality in the rights and privileges of citizens of Wisconsin, and citizens of the other states.

Plaintiff in Error alleges that he is a citizen of Ohio, (Fol. 11-of case), and that he is the assignee of the judgment which is his sole cause of action here. (Fol. 13). Now he had the option to sue over this judgment either in the United States court, as he has done, or in a court of the state But in either case, his action, by the terms of said law, would be barred in ten years from its rendition And if a citizen of Wisconsin had been the assignee of the same judgment, to sue it over he would have been compelled to do it in a court of the state, where his action would have been barred at exactly the same time. To show that there is no inequality of privileges, or immunities, under this Wisconsin law, we cite our illustration at 6th point, on page 3 of our supplemental brief submitted to this court on the former hearing of this case.

The fact is, that no case can arise, or be imagined under this Wisconsin law of limitations, in which the rights, immunities and privileges of the citizens of the several states and of the United States are not equal to those of the citizens of the state of Wisconsin.

XI.

At the end of his main brief, Plaintiff in Error refers to the private opinion of Ex-Senator Geo. F. Edmunds, there printed in full. As the text of his opinion and argument, the ex-senator starts out with this question at the bottom of page 42, to-wit:

"Does not the constitution of the United States 'require' that no state shall make any discrimination against the judgments of the courts of the United States, in that state, either as to methods of execution or remedy by suit upon them?"

Without answering this question, but evidently assuming the affirmative to be true, he bases his argument upon it. But the United States constitution *requires* nothing of the kind His premises are false and his conclusion and arguments are groundless, and

his entire opinion is but "the baseless fabric of a vision."

XII.

The argument of Plaintiff in Error by his counsel (Mr. Jenks) in his supplemental brief, does not differ much from that of his attorney, which we have been considering.

But said counsel's proposition first made in his oral argument here, at the former hearing, was, that there was an ambiguity in the Wisconsin statute of limitations, which, as he claimed, the manuscript case of Cole vs. Weil had settled in favor of Plaintiff, basing his argument on authorities not cited in his brief. Now there is no ambiguity in said ten years' statute of limitations on United States court judgments. If there is any ambiguity in the whole statute of limitations, it is solely as to whether the first part of the first clause of Section 16 of said statute does not repeal the first clause of Section 15 of the same statute, as suggested in said supplemental brief at p. 4-5; as to whether the statute really makes the limitations on state court judgments 10 or 20 years. But this does not touch the question as to the limitation on United States court judgments being ten years, about which there is no ambiguity whatever. Words could not make it plainer.

XIII.

Plaintiff in Error, by his said counsel, on p. 13 of said supplemental brief, insists that, if said United States court judgment, on which he has sued, had not been taken, the instruments or bonds which were its basis being sealed, the statutes of limitations on them would have been twenty years, and that, "as a penalty for" "bringing suit in the United States court, his property is lost ten years sooner than it would have been had he brought no suit at all." If said counsel had diligently examined the case he cites of Koshkonong vs. Burton, 14 Otto, 668, he would have found it

there decided that the railroad bonds on which the United States court judgment, in issue here, was obtained, would have been barred in 6 years, instead of 20 after maturity. Hence his argument here falls to the ground.

XIV.

But the main point of Plaintiff's counsel is, that said Wisconsin ten years statute of limitations is prohibited by the constitution of the United States, and especially by the 14th amendment thereto. And in support of this position he cites the slaughter house cases, 16 Wal. 36, when the whole reasoning of this court in those cases is directly against his position. In summing up those cases at p. 77, per Miller, J., this court say: "Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretense was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal constitution imposed upon the states—such, for instance, as the prohibition against *expost facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative powers of the states, and without that of the Federal government. Was it the purpose of the fourteenth amendment, by the simple declaration that no state should make or enforce any law which shall abridge

the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned, from the states to the federal government? And where it is declared that congress shall have the power to enforce that article, was it intended to bring within the power of congress the entire domain of civil rights heretofore belonging exclusively to the state?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of congress whenever in its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the states, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgment of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and federal governments to each other, and of both these governments to the people, the argument has a force that is irresistible, in the

absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the congress which proposed these amendments, nor by the legislatures of the states which ratified them."

XV.

Said counsel in his said oral argument here insisted that to affirm the judgment of the court below, would be to take a shaving off from the sovereignty of the United States. But under pretense of preserving the national sovereignty, we are not willing that the reserved sovereignty of the state of Wisconsin should be smitten down at the feet of this court. By the above extract, it appears that the said 14th amendment has not revolutionized, nor centralized our system of government. Upon the maintenance of the proper equilibrium between our state and national sovereignty, the stability of our dual system of government depends.

XVI.

We have shown that said Wisconsin ten years' statute of limitation is a local law enacted by the reserved sovereign power of the state, sanctioned by said unanimous decision of the full bench of its Supreme Court, approved of and adopted as the law of the United States courts by said 34th Section of said Judiciary Act of Congress, and re-enacted as aforesaid, and its constitutionality sustained by, and according with every decision of this court during the more than a century of its entire existence.

XVII.

Against these plain, well settled, fundamental principles of law, of what avail is it for Plaintiff in Error to cite, as he does in his main brief, numerous decisions of this court against the validity of laws which fall within the exceptions of said 34th Section of said Judiciary Act, such for instance, as the unlimited taxation of United States banks, unconstitutional interference

with inter-state commerce, transfer of cases to United States courts and cases subject to jurisdiction of United States courts where congress has fixed a statute of limitations different from the state, etc.? All of these cases have nothing to do with the issue here.

Plaintiff in Error is entitled to no sympathy in this matter. He bought the judgment at a small fraction of its face value, when to enforce it, it would most cruelly oppress the people of Watertown.

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